





THE
ONTARIO LAW REPORTS.

CASES DETERMINED IN THE COURT OF APPEAL
AND IN THE HIGH COURT OF JUSTICE
FOR ONTARIO.

1910.

REPORTED UNDER THE AUTHORITY OF THE
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1910

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JUDGES
OF THE
COURT OF APPEAL

DURING THE PERIOD OF THESE REPORTS.

THE HON. SIR CHARLES MOSS, C.J.O.
“ “ FEATHERSTON OSLER, J.A.
“ “ JAMES THOMPSON GARROW, J.A.
“ “ JOHN JAMES MACLAREN, J.A.
“ “ RICHARD MARTIN MEREDITH, J.A.
“ “ JAMES MAGEE, J.A.

Attorney-General :

THE HON. JAMES JOSEPH FOY, K.C.

JUDGES

OF THE

HIGH COURT OF JUSTICE

DURING THE PERIOD OF THESE REPORTS.

King's Bench Division :

THE HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.
“ “ BYRON MOFFATT BRITTON, J.
“ “ WILLIAM RENWICK RIDDELL, J.

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“ “ JAMES MAGEE, J.
“ “ FRANCIS ROBERT LATCHFORD, J.
“ “ WILLIAM EDWARD MIDDLETON, J

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“ “ HUGH MACMAHON, J.
“ “ JAMES VERNALL TEETZEL, J.

Exchequer Division :

THE HON. SIR WILLIAM MULOCK, C.J. Ex.D., K.C.M.G.
“ “ ROGER CONGER CLUTE, J.
“ “ ROBERT FRANKLIN SUTHERLAND, J.

ERRATA.

Page 10, 2nd line from top: for "ante 162" read "19 O.L.R. 162."

" 27, 1st line of head-note: for "1904" read "1894."

" 37, 18th line from bottom: for "Dennan" read "Denman."

" 51, 17th line from bottom: for "Evans" read "Ellis."

" 67, 12th line from bottom: for "13 O.W.N." read "13 O.W.R."

" 137, 11th line from top: for "intention" read "intension."

" 138, 4th line from top: for "1908" read "1909."

" 178, 4th line of head-note: for "7 Edw. VII." read "3 Edw. VII."

" 280, 12th line from bottom: for "*Fisher*" read "*Disher*."

" 656, 13th line from top: for "Bank Act" read "Bills of Exchange Act."

MEMORANDA

On Friday the 6th day of May, 1910, HIS MOST GRACIOUS MAJESTY KING EDWARD THE SEVENTH died at Buckingham Palace, in the tenth year of his reign.

On Monday the 9th day of May, 1910, HIS EXCELLENCY THE GOVERNOR-GENERAL OF CANADA made the following Proclamation:—

“Whereas it has pleased Almighty God to call to His Mercy Our late Sovereign Lord King Edward the Seventh of blessed and glorious memory, by whose decease the Imperial Crown of the United Kingdom of Great Britain and Ireland and all other His late Majesty’s Dominions is solely and rightfully come to the High and Mighty Prince George Frederick Ernest Albert, now know ye that I, the said Sir Albert Henry George, Earl Grey, Governor-General of Canada as aforesaid, assisted by His Majesty’s Privy Council for Canada, do now hereby with one full voice and consent of tongue and heart publish and proclaim that the High and Mighty Prince George Frederick Ernest Albert is now by the death of our late Sovereign of happy and glorious memory become our only lawful and rightful Liege Lord George the Fifth by the grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India, Supreme Lord in and over the Dominion of Canada, to whom we acknowledge all faith and constant obedience with all hearty and humble affection, beseeching God by whom all Kings and Queens do reign to bless the Royal Prince George the Fifth with long and happy years to reign over us.”

And on the same day HIS EXCELLENCY also made the following Proclamation:—

“Whereas by chapter one hundred and one of the Revised Statutes of Canada, 1906, intituled ‘An Act respecting the Demise of the Crown,’ it is, amongst other things, in effect enacted, that upon the demise of the Crown it shall not be necessary to

renew any commission by virtue whereof any officer of Canada, or any functionary in Canada or any Judge of the Dominion or Provincial Courts in Canada, held his office or profession during the previous reign; but that a Proclamation shall be issued by the Governor-General . . .

“Now, therefore, by and with the advice of Our Privy Council for Canada, we do, by this Our Proclamation, authorise all persons in office as officers of Canada and all functionaries in Canada, and all Judges of the Dominion and Provincial Courts in Canada, who, at the time of the demise of Our late Royal Father of glorious memory, were duly and lawfully holding or were duly and lawfully possessed of or invested in any office, place or employment, civil or military, within Our Dominion of Canada, or who held commissions under the late Sovereign, or all functionaries who exercised any profession by virtue of any such commissions, to severally continue in the due exercise of their respective duties, functions and professions, for which this Our Proclamation shall be sufficient warrant.

“And we do ordain that all incumbents of such offices and functions and all persons holding commissions as aforesaid shall, as soon hereafter as possible, take the usual and customary oath of allegiance to Us before the proper officer or officers hereunto appointed.

“And we do hereby require and command all Our loving subjects to be aiding, helping and assisting all such officers of Canada and other functionaries in the performance of their respective offices and places.”

On Monday the 9th day of May, 1910, THE CHIEF JUSTICE OF ONTARIO, THE CHANCELLOR OF ONTARIO (PRESIDENT OF THE HIGH COURT OF JUSTICE), THE CHIEF JUSTICE OF THE COMMON PLEAS, THE CHIEF JUSTICE OF THE KING'S BENCH, and THE CHIEF JUSTICE OF THE EXCHEQUER DIVISION, severally took and subscribed the oath of allegiance to HIS MAJESTY KING GEORGE THE FIFTH, before HIS HONOUR THE LIEUTENANT-GOVERNOR OF THE PROVINCE OF ONTARIO IN COUNCIL.

On Tuesday the 10th day of May, 1910, MR. JUSTICE GARROW, MR. JUSTICE MACLAREN, MR. JUSTICE MEREDITH, and MR. JUSTICE MAGEE, JUDGES OF THE COURT OF APPEAL FOR ONTARIO, severally

took and subscribed the said oath of allegiance before THE CHIEF JUSTICE OF ONTARIO in open Court.

On Monday the 23rd May, 1910, MR. JUSTICE MACMAHON, ONE OF THE JUDGES OF THE HIGH COURT OF JUSTICE, took and subscribed the said oath of allegiance before THE PRESIDENT OF THE HIGH COURT at his Chambers.

On Monday the 9th day of May, 1910, MR. JUSTICE BRITTON, MR. JUSTICE TEETZEL, MR. JUSTICE CLUTE, MR. JUSTICE RIDDELL, MR. JUSTICE LATCHFORD, AND MR. JUSTICE SUTHERLAND, JUDGES OF THE HIGH COURT OF JUSTICE, severally took and subscribed the said oath of allegiance before THE PRESIDENT OF THE HIGH COURT in open Court.

On Saturday the 14th day of May, 1910, MR. JUSTICE MIDDLETON, ONE OF THE JUDGES OF THE HIGH COURT OF JUSTICE, took and subscribed the said oath of allegiance before THE PRESIDENT OF THE HIGH COURT at his Chambers.

JUDICIAL APPOINTMENTS.

On the 9th April, 1910, THE HONOURABLE JAMES MAGEE, one of the Judges of the High Court of Justice, Chancery Division, was appointed a Judge of the Court of Appeal, in the place of THE HONOURABLE FEATHERSTON OSLER, retired.

On the 9th April, 1910, WILLIAM EDWARD MIDDLETON, one of His Majesty's Counsel, was appointed a Judge of the High Court of Justice, Chancery Division, in the place of THE HONOURABLE JAMES MAGEE.

COURT OF APPEAL.

Monday the 18th April, 1910.

This being the opening day of the second session of the Court for the year, the Court met at 11 a.m., there being present the CHIEF JUSTICE OF ONTARIO, MR. JUSTICE OSLER, MR. JUSTICE GARROW, MR. JUSTICE MACLAREN, and MR. JUSTICE MEREDITH.

After the delivery of judgments in certain cases argued during the preceding session, MR. JUSTICE OSLER being about to leave the Bench, SIR ÆMILIUS IRVING, K.C., representing the Law Society of Upper Canada, the County of York Law Association, and the Bar Association of Ontario, addressed the Court, express-

ing the high estimation in which the retiring Judge was held by the public and profession and assuring him of their good wishes for his future prosperity and happiness.

At the conclusion of SIR ÆMILIUS IRVING'S address, THE CHIEF JUSTICE expressed the desire of his colleagues and himself to be associated with all that had been said.

MR. JUSTICE OSLER responded, thanking the Bar for their kindness and good wishes, and bidding them farewell. He then left the Court.

CALL TO THE BAR.

During Hilary Term, 1910, the following gentlemen were called to the Bar:—

MELVILLE GRANT.

HAROLD GRAHAM WEIR.

WILLIAM VICTOR MARKLE SHOWER.

During Easter Term, 1910, the following gentlemen were called to the Bar:—

JOHN CRAIG STEWART.

THOMAS HUBERT STINSON.

JOHN IRWIN GROVER.

(On the 19th May.)

CHARLES FORSYTH RITCHIE.

(With honours and silver medal.)

RICHMOND WYLIE HART.

(With honours and silver medal.)

LIVIOUS PERCY SHERWOOD.

OSCAR HERMAN KING.

SEM WISSLER FIELD.

NORMAN ROY ROBERTSON.

THOMAS WALLACE LAWSON.

(On the 10th June.)

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REPORTS OF CASES

DETERMINED IN THE

COURT OF APPEAL

AND IN THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[IN CHAMBERS.]

RYCKMAN V. RANDOLPH.

1909

Writ of Summons—Defendants Resident out of Ontario—Carrying on Business in Ontario—Partnership—Service on Person in Ontario—Con. Rule 223—Leave to Appeal—Conflicting Decisions—"High Court"—Con. Rule 777 (3) (a) (b).

Nov. 5.
Nov. 13.
Nov. 23.

The defendants R. carried on business in partnership as stockbrokers in New York, and the defendants W. as stock brokers in Toronto, D. being manager for the latter. The plaintiff served the writ of summons upon D. at the place of business of the defendants W. in Toronto, alleging that D. was a person having the control or management there of the partnership business of the defendants R. (Con. Rule 223), the contention being that the defendants R. in fact carried on business in partnership with the defendants W. at Toronto:—

Held, upon the evidence, that the business carried on in Toronto at the time of the service of the writ was the ordinary business of brokers with correspondents (the defendants R.) in New York, who, for a certain consideration, transacted such business as they saw fit to accept for the Toronto clients of the defendants W., and charged such rates therefor as had been agreed upon; and the fact that on sales in New York on "short account" the defendants W. were to be paid half of the amount which the defendants R. received, did not constitute a partnership or business carried on in Toronto; and therefore the service was set aside.

Order of the Master in Chambers affirmed.

Leave to appeal to a Divisional Court was refused, there being no conflicting decisions by Judges of the High Court within the meaning of Con. Rule 777 (3) (a), which does not refer to the High Court in England; and there being no good reason to doubt the correctness of the judgment, as required by clause (b).

MOTION by the defendants E. & C. Randolph and by John J. Dixon, a member of the firm of A. J. Wright & Co., also defendants, to set aside service of the writ of summons in this action upon Dixon for the defendants E. & C. Randolph. The plaintiff assumed to serve Dixon as a person having the control or management at

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Toronto of the business of the defendants E. & C. Randolph, who resided and carried on business in New York.*

The motion was heard by the Master in Chambers on the 3rd November, 1909.

W. E. Middleton, K.C., for the defendants E. & C. Randolph.

Strachan Johnston, for Dixon.

C. S. MacInnes, K.C., for the plaintiff.

November 5. THE MASTER IN CHAMBERS:—To answer the motion effectively the plaintiff must satisfy the Court that the Randolph firm was carrying on business within this Province when the service was effected. For this result the plaintiff relies on the facts as set out in his affidavit. Happily the parties do not differ about the actual facts, but as to the correct inference therefrom they are at issue.

The name of the Randolphs undoubtedly appears both in the Toronto city directory and in the telephone directory. In the latter it reads thus:—

Main 3903—Randolph, E. & C.—John J. Dixon—42 King W.

Affidavits have been filed, both of Dixon and Edmund Randolph, denying that any business is being carried on by the Randolphs here, and stating that Dixon's firm merely does its New York business through the Randolphs.

Dixon explains that the appearance of the Randolphs' name in the directories was only by his order and at his cost and for his convenience, and this is deposed to by Randolph, who states that he had no knowledge of such insertions nor did he authorise them.

The cheque given by the plaintiff on the 28th June, 1909, was deposited in the Bank of Toronto here to the credit of the Randolphs by Dixon, and the various brokers' notes and statements sent to the plaintiff by Randolph were stamped by Dixon, through whom they were sent. This, the latter says, was merely for his own

* Con. Rule 223: Where persons are sued as partners in the name of the firm under Rule 222 the writ shall be served either upon any one or more of the partners, or at the principal place within Ontario of the business of the partnership, upon any person having the control or management of the partnership business there; and subject to these Rules such service shall be deemed good service upon the firm whether any of the members thereof are without Ontario or not, and leave to issue a writ against them shall not be necessary. . . .

guidance and to shew the client that the documents so marked were correct. Randolph also says he had no knowledge of this being done.

The plaintiff also relies on the fact that the Randolphs' name appeared on the door of the Wright defendants' office. Dixon says as to this that the display on the door is as follows:—

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A. J. WRIGHT & CO.

A. J. Wright.	BANKERS	Direct Wires
J. J. Dixon.	JOHN J. DIXON	to
A. B. Wright.	RESIDENT PARTNER.	E. & C. Randolph.

It is conceded that at the time when the transactions now in question took place the direct wire was paid for by the Randolphs. At that time, however, the relations between them and the Wrights were altogether different from those which now exist—a fact which, the Randolphs say, explains those statements in their defence to an action for the same cause brought by the plaintiff in the State of New York, but afterwards discontinued. The documents are produced and seem to shew that after December, 1907, anything in the way of a partnership between the Wrights and Randolphs ceased. The dealings in question in this action had terminated in March, 1907.

The lease of the offices of Wright & Co. is also produced. It is dated the 24th February, 1908, and A. J. Wright & Co. are the sole lessees. Dixon also deposes that he is in no sense in the employ of the Randolphs or in the pay of that firm.

There has been no cross-examination of any of the deponents, although notice of this motion was served before the vacation.

The words "carrying on business" are said in the Annual Practice, 1908, vol. 1, p. 650, to mean "the possession within the jurisdiction of a place of business held in the name of the firm, where business is carried on on behalf of the firm by a partner or by a person or persons in the pay of the firm. . . . If the firm have no place of business in this country held in the name of the firm, they do not carry on business within the jurisdiction," even under the facts of such a case as that of *Singleton v. Roberts* (1894), 70 L.T.R. 687. Many other cases can be found, but it will be enough to refer to some in which service was set aside: *Grant v. Anderson*, [1892] 1 Q.B. 108, in the Court of Appeal; *The Princesse Clémentine*,

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[1897] P. 18; and the earlier case of *Baillie v. Goodwin* (1886), 33 Ch.D. 604, the first decision on the Rule.

The facts in some of those cases were stronger in the plaintiff's favour than those now to be considered. So too were the facts in *Mackenzie v. Fleming H. Revell Co.* (1906), 7 O.W.R. 414.

It is to be observed that the assumption of jurisdiction over absent foreigners can only be supported on the ground of constructive residence or attornment to the jurisdiction: see *Comber v. Leyland*, [1898] A.C. 524; *Murphy v. Phoenix Bridge Co.* (1899), 18 P.R. 495, where this question was dealt with by the Court of Appeal, and it was said (per Osler, J.A., at p. 499) that service would be valid only if "at the time of service" the defendants were "carrying on any of their business in this Province in such a manner as to warrant us in holding that they were then resident here, as that term is explained in" cases cited.

The motion is, therefore, entitled to prevail, and the service must be set aside with costs.

The plaintiff appealed from the Master's order, and the appeal was argued, by the same counsel, before CLUTE, J., in Chambers, on the 12th November, 1909.

November 13. CLUTE, J.:—It is contended on behalf of the plaintiff that the defendants Randolph carry on business in Toronto within the meaning of Rules 222-3, and that service upon Dixon, who was alleged to be in their employ, is good service.

The sole question is, whether or not these defendants carry on business in Toronto within the meaning of the said Rules. There is no doubt that Dixon had the control and management of the business carried on in Toronto; but the question is whether that business was the business of the defendants Wright & Co. or whether the defendants Randolph were partners. Wright & Co. are brokers in Buffalo. Edmund and Charles Randolph are brokers in New York.

Prior to the 28th January, when the first transaction forming the subject matter of this suit took place, Wright & Co., with or without Randolph as partners, carried on a brokers' business in Toronto, with Dixon as manager. The arrangement then existing between the said Wright & Co. and the Randolphs is set forth in a document

(exhibit A) referred to in the affidavit of Edmund Randolph. That document states that the Randolphs were to take over the accounts of A. J. Wright & Co.'s clients, furnish adequate wire facilities to their office in New York connecting all of Wright & Co.'s offices with theirs, and transact a business in the several offices referred to; to maintain a separate ledger, known as the A. J. Wright & Co. ledger, in which a record of all business transacted by them for the clients of Wright & Co. in their several offices shall be kept—"it being the intention to ascertain the entire amount of profit and loss arising from the handling of this particular business, which shall be based upon crediting the commission account with the gross commission charged clients of profits and interests, loans on shorts, and debiting the account with all bad debts and expenses, the intention being to divide equally the profits and losses arising from the carrying out of this business by them." There is then the following statement: "As this is to be strictly a joint account, and is in no sense to be interpreted as a partnership agreement, it is understood that you should pay to us (Wright & Co.) a sum equal to one half of the profits arising from the transaction of this business, and shall charge to us (Wright & Co.) a sum equal to one half of the loss in the transaction of this business, including bad debts, should any such loss arise."

It is admitted that this was the arrangement under which the business was carried on in Toronto by Wright & Co. until December, 1907, when a new arrangement was entered into. That appears in exhibit C. to Randolph's affidavit. It is a somewhat lengthy document, but the substance of it is that the old arrangement was abrogated, and, in lieu thereof, Wright & Co. agreed to pay \$6.25 per 100 shares for the use of the telegraph line between their offices and New York, which the defendants Randolph agreed to furnish. Under this arrangement any profit or interest which Wright & Co. might make from their customers, over and above the said rate of \$6.25, was to be credited to their account, and the joint account was entirely abolished. Then follows this clause: "On short account we are of course perfectly willing to do your business on the same terms as that in use with all the rest of our correspondents. We are allowing you half of what we get."

"Short account" was explained to mean where sales were made

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instead of purchases. This was the arrangement in force at the time the writ was served.

It is urged that the manner of transacting business when the transactions took place giving rise to the present cause of action, is important. The first transaction was on the 28th January, 1907, when the plaintiff gave a cheque to the order of E. & C. Randolph for \$5,000 on the purchase of a number of shares of Southern Pacific, and received a bought note from Wright & Co. for such purchase, signed by E. & C. Randolph. In the letter accompanying the bought note it is stated by Wright & Co. that "we are advised by Messrs. E. & C. Randolph, 25 Broad Street, New York, of the execution this day of the following orders for your account, official contracts for which will be forwarded in due course: Bought 500 shares Southern Pacific at 93 $\frac{1}{2}$."

A further statement was enclosed shewing a credit by deposit of \$5,000 from the plaintiff.

There is a sheet shewing the transaction and stated to be "in account current with Edmund & Charles Randolph," and stamped upon the sheet are the words "A. J. Wright & Co. ledger."

The action is brought for the return of certain shares of stock and for damages for detention and conversion and for an account.

It appears that the name of E. & C. Randolph was inserted in the directory of the city of Toronto and also in the telephone directory of the city of Toronto. It is denied by the defendants that there was any authority for so doing, and Dixon says that he was not authorised by the defendants Randolph to so insert their name.

After the new agreement was made in December, 1907, the business was carried on under that arrangement. Whatever may be the proper view to take as to the existence of a partnership during the time when these transactions took place which gave rise to this action, it is obvious that the question whether or not the service is good must have reference to the nature of the business carried on at the time when and place where the service was made, and it therefore seems to me that the document put forth shewing what part E. & C. Randolph took in the purchase of the stock prior to December, 1907, does not throw much light upon the nature of the business carried on at the time of the service of the writ, which was in June, 1909.

It is conceded that E. & C. Randolph continued to have a bank

account in Toronto, where deposits were made representing the margins to be paid on purchases of stock through them in New York. Stress was laid upon the clause under the new arrangement by which E. & C. Randolph agreed to do Wright & Co.'s business on "short account," they allowing Wright & Co. half of what they got. The premises where Wright & Co. carried on business in the city of Toronto are held under lease to Wright & Co., dated the 24th February, 1908, for five years from that date. The defendants E. & C. Randolph are not parties to the lease. The words upon the centre of the door of the said premises are "A. J. Wright & Co., Bankers, John J. Dixon, Resident Partner;" on one side of the door—"A. J. Wright, J. J. Dixon, A. B. Wright;" on the other side the distinct words—"Direct wires to E. & C. Randolph." The name E. & C. Randolph, as stated in Dixon's affidavit, has never appeared upon the said firm's premises except as part of the phrase "Direct wires to E. & C. Randolph."

Dixon expressly swears that the contracts in question in this action were not entered into by the plaintiff with himself as representing and acting for E. & C. Randolph; that Wright & Co. have an office in the city of Toronto, and have no office in New York; that their principal business has been in stocks dealt with on the New York Stock Exchange; that, having no office in the city of New York, and not being able to purchase and carry stocks for customers on the usual terms of dealing between broker and client, they received orders from their clients for transmission to E. & C. Randolph of New York, to whose office they have a direct wire. He further states that the general course and method of carrying on their business on behalf of their clients with E. & C. Randolph is correctly stated in Edmund Randolph's affidavit.

Randolph in his affidavit states that he is the senior member of the firm of E. & C. Randolph, the other members of which are De Voe, Hartman, Evans, and Price, all of whom reside in New York, where they carry on business as stock brokers; that they have no office or place of business in the Province of Ontario; that no member of the firm resides in Ontario, or carries on business there, either on behalf of himself or on behalf of the firm; that there is no person in Ontario who is in the pay or employ of their firm; that Wright & Co. are duly registered upon the New York Stock Exchange, but have no office in that city; that they carry on business

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at the city of Toronto, as well as in the cities of Buffalo and Syracuse; that, in order to enable them to execute orders received from their clients for the purchase and sale of securities dealt in on the New York Stock Exchange, Wright & Co., in the autumn of 1906, entered into an arrangement with E. & C. Randolph, above referred to; that such arrangement continued until the 2nd December, 1907; that by the original arrangement the two firms share equally in profits and losses on business transacted by the defendants Randolph in the city of New York on behalf of the defendants Wright & Co.'s clients, and that, after the 27th December, 1907, the defendants Randolph ceased to be responsible for any losses which might arise by reason of the transaction of such business, and that thereafter they charged for buying and selling shares \$6.25 for every hundred shares bought and sold, and furnished telegraph wires; that the method of carrying on such business has always been and still is substantially as follows. The New York firm receive orders by telegraph from Wright & Co. to buy or sell stocks on the New York Stock Exchange. The stocks are purchased or sold in New York. In marginal transactions, such as the transaction in question in this action, the necessary loans on the stocks are made in New York by the said Randolph firm, to carry the stocks. When the stocks are sold, they are sold on the New York Stock Exchange; no person in Toronto, or elsewhere in the Province of Ontario, has any right to enter into contracts or obligations on behalf of the defendants Randolph; they are under no obligation to execute any orders received from Wright & Co.; they are not interested in the lease of the offices occupied by Wright & Co. in Toronto, and know nothing of the terms upon which the offices are or have been leased; Dixon is not and never has been in any sense an employee or representative of the firm; they never had nor have now any contractual relations with him, their agreements being with the firm of Wright & Co.

The above, I think, is a fair outline of the facts as stated, as far as they affect this case. I am wholly unable to see how, upon this statement of facts, it can be said that a partnership exists between the defendants Randolphs and Wright & Co. It appears to me that, so far as the business as carried on at the time of the service of the writ is concerned, it was the ordinary business of brokers carrying on business in Toronto with correspondents in New York, who, for

a certain consideration, transacted such business as they saw fit to accept for the clients of the Toronto firm, and charged such rates therefor as had been agreed upon. The fact that on sales in New York on "short account," the Wright firm were to receive half of the amount which the defendants Randolph received, does not, in my opinion, constitute a partnership or business carried on in the city of Toronto. They have no place of business here; they have no persons in their employ here; they have no persons to represent them here; they are not interested in the business carried on here except to the extent of the charge which they make upon purchases and sales in New York.

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I have read the following cases relied on by the plaintiff and do not think that they can successfully be invoked in support of the plaintiff's contention: *Dunlop Pneumatic Tyre Co. v. Actien-Gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.*, [1902] 1 K.B. 342; *La Bourgogne*, [1899] P. 1, 18; *La Compagnie Générale Transatlantique v. Law*, [1899] A.C. 431; *Palmer v. Gould's Manufacturing Co.*, [1884] W.N. 63; *Mackenzie v. Fleming H. Revell Co.*, 7 O.W.R. 414; *Erichsen v. Last* (1881), 8 Q.B.D. 414.

See *contra*: *Singleton v. Roberts*, 70 L.T.R. 687; *Grant v. Anderson*, [1892] 1 Q.B. 108, 116; *Baillie v. Goodwin*, 33 Ch.D. 604; *The Princesse Clémentine*, [1897] P. 18.

I think the appeal should be dismissed with costs.

The plaintiff moved under Con. Rule 1278 [777]* for leave to appeal from the order of CLUTE, J.

The motion was argued, by the same counsel, before RIDDELL, J., in Chambers, on the 22nd November, 1909.

* 777. (1) A person affected by an order or judgment pronounced by a Judge in Chambers which finally disposes of an action may appeal therefrom to a Divisional Court without leave

(2) Except in cases in which a right of appeal is specially conferred by statute or by Rule of Court, no appeal shall lie from any judgment or order of a Judge in Chambers, which does not finally dispose of the action, unless by special leave of a Judge of the High Court other than the Judge by whom the judgment or order was pronounced.

(3) Such special leave shall not be given unless:

(a) There are conflicting decisions by Judges of the High Court upon the matter involved in the proposed appeal, and it is in the opinion of the Judge desirable that an appeal should be allowed; or

(b) There appears to the Judge to be good reason to doubt the correctness of the judgment or order from which the applicant seeks leave to appeal, and the appeal would involve matters of such importance that in the opinion of the Judge leave to appeal should be given. . . .

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November 23. RIDDELL, J.:—I have in *Robinson v. Mills*, (1909), ante 162, considered the conditions under which leave should be granted.

It is admitted that there are no conflicting decisions by Judges of the High Court for Ontario; but it is said that there are conflicting decisions by the Judges of the High Court in England. I do not think that is sufficient; it is quite plain that the High Court referred to in the Con. Rule is the High Court of Justice for Ontario. Consequently the provisions of clause 3 (a) do not apply.

If leave is to be granted, it must be under 3 (b), *i.e.*, (1) there must appear to be good reason to doubt the correctness of the judgment, and (2) the appeal must involve matters of such importance that, in my opinion, leave to appeal should be given.

It will be seen that the first prerequisite is not the same as that appearing in the Ontario Judicature Act, sec. 81 (2), referred to in *In re Shafer* (1907), 15 O.L.R. 266, at p. 273, the word "deems" being used in this section. But I am not able to go even so far as is necessitated by the Rule—I cannot say that there is good reason to doubt the correctness of the judgment. I do not think it at all necessary that I should go into an elaborate discussion of the facts or the cases.

The motion will be dismissed with costs to the defendants Randolph in any event of the action, as in the case of *Robinson v. Mills*.

[DIVISIONAL COURT.]

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July 21.
Nov. 23.

Sale of Goods—Perishable Articles—Destruction in Transit—Incidence of Loss—Contract—Shipment “f.o.b.”—Bill of Lading—Property not Passing until Payment of Draft.

A quantity of apples ordered by the defendants, from Regina, Saskatchewan, were placed on cars at Belleville, Ontario, by the plaintiff, the seller, in pursuance of one term of the contract, “f.o.b. Ontario.” They were to be carried to Regina, and to be paid for “cash on delivery at Regina.” They were sent with contemporaneous bills of lading made out to the seller, or his agents, a bank, to be held against the arrival of the goods. Bills of exchange at sight were also forwarded with the bills of lading, to be accepted and paid by the purchasers, and upon payment the bills of lading were to be handed over to the defendants. The invoice did not say that the goods were shipped on account of or at the risk of the buyers, whereas the bills of lading shewed that the goods were shipped as the property of the seller or his agents. The apples were frozen in transit, and the defendants refused to accept or pay for them:—

Held, upon consideration of the contract and the dealings of the parties, that the shipment f.o.b. at Belleville was not a constructive delivery to the carrier for the purchasers; it was a delivery of possession to the carrier pursuant to the bill of lading and for the seller or his agents at Regina; and no delivery of possession to the purchasers was contemplated till they accepted and paid for the apples at Regina. Till then possession and property were alike withheld by the seller, and the property was to be divested from him and lodged in the purchasers first and only when payment was made; the property was still the seller’s during the transit, and on him the loss fell.

Mirabita v. Imperial Ottoman Bank (1878), 3 Ex. D. 164, followed.

Browne v. Hare (1858-9), 3 H. & N. 484, 4 H. & N. 822, distinguished. Judgment of BRITTON, J., reversed.

ACTION for the price of 558 barrels of apples sold by the plaintiff to the defendants, and delivered to the defendants on board the cars of the Grand Trunk Railway at Belleville, to be forwarded to Regina, amounting in all to \$1,558.75. The facts are stated in the judgments.

The action was tried by BRITTON, J., without a jury, at Belleville, on the 27th May, 1909.

W. S. Morden, for the plaintiff.

H. Cassels, K.C., for the defendants.

July 21. BRITTON, J.:—On the 16th October, 1906, it is alleged that a contract was made for the purchase by the defendants of 755 bbls. of apples, at the price of \$3 per bbl. for Northern Spys, \$2.75 for Greenings, \$2.25 for Talman Sweets, and \$2.50 for other varieties, to be delivered to the defendants, f.o.b. cars at the point of shipment, in the Province of Ontario.

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In part performance of this contract, the plaintiff on the 24th October, 1906, shipped 201 bbls. on a car of the Grand Trunk Railway at Belleville, and these the defendants accepted and paid for. The plaintiff shipped the balance of the said apples f.o.b. on the cars of the Grand Trunk Railway at Belleville, as follows: on the 31st October, 215 bbls., on car 1986; on the 2nd November, 1906, 167 bbls., on car 23108, and 176 bbls. on car 14735; making 558 in all—at prices agreed upon for the respective varieties of the apples.

The contest is as to the 558 bbls. above mentioned, and the defendants in their statement of defence make general denial of every allegation of the plaintiff—other than that the plaintiff is a dealer in fruit and produce, residing at Belleville, and that the defendants are a company having their head office and carrying on business at Regina, in the Province of Saskatchewan.

The difficulty has arisen between the parties because some of the apples were injured by frost, in transit. The defendants refused to accept the apples on their arrival at Regina, and refused to pay freight, and refused to accept the plaintiff's drafts for the price.

It is not in question that the plaintiff is a large dealer in apples for export, and that the defendant company deal largely in them in the Province of Saskatchewan. The beginning of the correspondence about apples, so far as it is important in this action, is the letter of the defendants to the plaintiff, dated the 7th August, 1906. This letter has reference to "Duchess" apples, and is as follows: "We want to buy a few cars of early Duchess apples in bbls. for shipment, just as soon as apples are matured sufficiently to be packed. If you can supply us with one or more cars of the best apples, be good enough to quote us by wire your lowest price f.o.b. Ontario, cash on delivery at Regina. State the earliest date you can ship. We will give you shipping instructions when we hear from you."

The plaintiff received that letter on the 11th August; and wired from Belleville "dollar seventy-five f.o.b. here . . .". The plaintiff also wrote on that day, first as to Duchess apples, and second as to "booking orders" for later shipment, and giving prices for different varieties.

On the same day the defendants, on receipt of the telegram at

Regina, wrote to the plaintiff confirming order by telegram—mentioning price f.o.b. Ontario—and closing the letter by saying, “We will require other varieties at a later date.”

On the 14th September the defendants wrote: “We shall be handling quite a quantity of fall and winter apples, and would like to have you send us quotations by return mail for the highest grades quality, only of different varieties, etc., stating the probable date of shipment, etc. We pay spot cash for everything, but must have the best quality. Please be good enough to let us hear from you by return mail.”

This was followed by further correspondence, and by sale by the plaintiff to the defendants on the 23rd September of three cars of fall apples on terms now contended for by the plaintiff, except as to prices.

On the 15th October the defendants wired, and on the following day wrote to the plaintiff ordering as above mentioned. The contract was then, as made by the correspondence, that the plaintiff was to deliver the apples, of the kind and quality wanted, f.o.b. on the cars at a shipping point in Ontario—in this case Belleville—to be forwarded to the defendants—that the defendants would accept the apples at Regina, paying freight thereon, and paying for the apples upon their being at Regina ready to be delivered, so that the defendants could get them upon paying for them and paying for freight and charges thereon.

I find that the apples were shipped, and were in good condition when shipped, fit in every way in the main as to quality and condition to comply with the apples ordered, and which the plaintiff sold. It is not necessary to find that every apple was sound—or of grade mentioned at time of shipment—nor is it necessary to say whether there was a shortage to some extent as to a particular grade. Here there was an entire contract for the purchase of 755 bbls., and there was part delivery—i.e., of 201 bbls.; there was no right of rejection of the whole of the order. The defendants’ remedy in such case was to obtain reduction of price, etc., for damage from non-delivery according to the contract: see *Thomson v. Dymont* (1886), 13 S.C.R. 303.

The plaintiff personally supervised the loading—he inspected the apples. He knew that the defendants wanted only first class fruit. The plaintiff’s desire was not only to fulfil his contract but

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to please the defendants—and so he was careful to send only first class apples. There was, in my opinion, a substantial compliance with the contract. After shipment, and while the apples were *en route*, some of them were injured by frost, and the defendants refused to receive them—contending that they were entitled to get the apples in good condition at Regina. It was contended at the trial—although not in evidence—and nothing turns on that, that the Canadian Pacific Railway Company sold the apples for freight and charges, and that there remains in their hands a surplus unclaimed by either party to this action.

The defendants contend that the property in the apples did not pass by delivery f.o.b. at Belleville—that they were entitled to have delivery at Regina, where, if good and if tendered, they, the defendants, would be bound to accept and pay for them, the defendants also paying freight to that point—and, that being so, anything happening to the apples *en route* did not concern the defendants.

The defendants concede that they are to pay freight from point of shipment in Ontario—but as, by their letter of the 7th August, 1906, they stipulated that they were to pay cash on delivery at Regina—that must govern as to the apples in question. That must, in my opinion, be construed as delivery by the carrier at Regina or receipt by the defendants at Regina. F.o.b. at Belleville determines the plaintiff's liability as to the delivery of apples purchased, and receipt of apples at Regina determines the time when the defendants should pay. It would not be reasonable or usual, in the absence of special agreement, to ask or expect a purchaser to pay until the goods in the natural order of things would be within his reach; so that they could be turned over to his customers. The contract between the parties is a special one, and, apart from quantity, quality, and price, relates to the place where the plaintiff was to deliver, and the time the defendants were to pay. The defendants were entitled, on this purchase for cash, to the time between the time of shipment at Belleville and the arrival of the apples at Regina.

In holding, as I do, that delivery f.o.b. at Belleville was a fulfilment of the plaintiff's contract, I do not lose sight of the fact that delivery to the carrier "is only constructive, not actual, delivery to the purchaser;" so, using the words delivery at Regina

does not prevent property passing to the defendants when on board cars at Belleville: see *Ex p. Rosevear China Clay Co., In re Cock* (1879), 11 Ch.D. 560. That was a case as to the right of stoppage *in transitu*—but the principle involved in the present case is clearly stated by Brett, L.J., at p. 569: “As soon as the clay” (apples in this case) “was appropriated by the vendors to this contract, and was placed on board the ship, the property in it passed to the purchaser, and at the same time, as between the vendor and the purchaser, there was a delivery of the clay to the latter.”

Delivery according to contract so that the purchaser has constructive possession is sufficient to vest the property in him—although actual possession by the purchaser, or his servant or agent for the purpose, is necessary to defeat the right of stoppage in transitu.

On the 31st October the plaintiff shipped at Belleville, on board car 1986, 215 bbls. of these apples, consigned to the order of himself at Regina, with instructions to notify the defendants at Regina, and with instructions to send apples in heated cars from Fort William. The plaintiff then attached to the bill of lading his draft at sight upon the defendants for \$579.50, being the price of these apples, indorsed the bill of lading to the Bank of Montreal—which draft and bill of lading were sent forward for collection of draft, and with instructions stamped upon the draft to hold for arrival of goods. Shipment of the remainder of the apples was made on the 1st November, in cars 14375 and 23108, with similar instructions, and a draft made to accompany each bill of lading for the price of the apples mentioned therein. In the shipment of the 1st November the bill of lading consigned goods to the Bank of Montreal at Regina. Invoices were sent to and received by the defendants with the statement of sight draft as settlement.

To these invoices no objection was made by the defendants. The defendants were notified of their arrival, and they refused to accept the apples or pay the freight or pay the drafts. The drafts were then at Regina. The bills of lading were attached thereto, and these bills were properly indorsed for delivery of the apples to the defendants.

It is perfectly clear that the defendants knew that they could get the apples upon payment of the purchase price and freight from Belleville to Regina. The defendants demanded inspection of the

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apples. The Bank of Montreal, acting as agents for the plaintiff, gave permission to inspect, but the railway company refused to allow it, except upon payment of freight, and this the defendants refused to pay.

R. J. Burdette, agent for the Canadian Pacific Railway Company at Regina, gave evidence of arrival of apples—and that Mr. Laird, managing director of the defendant company, requested inspection of the contents of these cars, and that such inspection was refused.

Mr. Laird, president as well as managing director of the defendant company, was examined, and stated that the apples arrived at Regina on the 23rd November, 1906, and that he was notified by the railway company of their arrival, and drafts in payment of the apples were presented to him by the Bank of Montreal, and that he refused to accept, as he wanted to inspect the apples first. He stated that the Bank of Montreal were willing to permit such inspection. Mr. Laird says he offered to pay the freight charges so as to permit inspection, and, if the apples were found good, would pay the full price and freight charges.

The bank had no authority or instructions to accept any proposal that payment for apples should depend upon their condition as found then on inspection.

Mr. Laird says he was never offered delivery of the apples by the plaintiff, or any one on his behalf, but was simply presented with drafts without any mention being made of delivery of goods, or assignments, or delivery of bills of lading.

This evidence narrows the defence to refusal by the Canadian Pacific Railway Company to permit inspection, and to the question of whether or not the plaintiff must suffer the loss of apples damaged by frost, although good when shipped at Belleville. Apart from the legal position, which, in my opinion, is that the defendants must stand the loss, if any, which occurred *en route* between Belleville and Regina, the defendants, when the letter of the 16th October was written, were also of that opinion. In that letter to the plaintiff is this clause: "No doubt you are aware that at this season of the year, when these apples will be coming forward, they are liable to heavy frosts, and we do not care to take chances on having any frozen apples."

The defendants were not entitled to inspection at Regina as a condition precedent to accepting the apples. The defendants were

entitled to inspection at place of delivery by the plaintiff. Before or when the apples were placed upon the cars at Belleville, or at any time before the apples left Belleville, the defendants could have had, and were entitled to have, inspection. Failing to inspect, the defendants must rely upon being able to prove that the apples were not according to contract, or that the plaintiff could not prove that they were so. If the defendants are entitled to damages by reason of the failure of the plaintiff to perform his contract, the taking over of the apples would not prevent the enforcement of such liability.

The law as to inspection, examination, etc., has recently been considered in *McLean Produce Co. v. Freedman* (1908), 12 O.W.R. 1038. *Perkins v. Bell*, [1893] 1 Q.B. 193, and *Oelrichs v. Trent Valley Woollen Manufacturing Co.* (1894), 23 S.C.R. 682, are there cited. These were cases of sale by sample, but in any case where there is a sale of particular articles—where time for inspection has not been expressly or impliedly extended, where there is opportunity for it—the buyer's opportunity is *prima facie* at place of delivery: see Benjamin on Sale, 5th ed., p. 753.

It was argued that the plaintiff by having the apples shipped, part of them to his own order, and indorsing the bill of lading to the Bank of Montreal, and part of them shipped to the order of the Bank of Montreal, to be delivered only upon payment of the drafts for the price, so retained the property in the apples as to compel him to bear the loss which was occasioned by frost.

The defendants rely upon *Corby v. Williams* (1881), 7 S.C.R. 470. That case in many particulars is like the present—but it is distinguishable. The contract there was for a cargo of corn. Corby, the purchaser, wired at Belleville to the defendant, at Toledo: "Will take 13,000 old, high, mixed, 47 delivered here—vessel paying loading draw ten days through Merchants Bank here; send prime corn;" to which Williams, the vendor, replied from Toledo: "Telegram received. Executed order, limit. Loading schooner Annandale—about 13,000." Williams drew upon Corby, and Corby accepted the draft. The corn arrived in due course, but in a damaged condition, and its acceptance was refused by Corby. The action was brought upon the bill of exchange which Corby had accepted. The Court of Appeal held that the contract was one of agency, and that the defendant was liable, but the Su-

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preme Court reversed that and held that the relation between the parties was that of vendor and purchaser, and further that the property in the corn was in Williams until it was received at Belleville for unconditional delivery there. The contract was for delivery at Belleville, and it was to be paid for, not on arrival or on delivery, but by draft at ten days, which the purchaser had accepted. The case seems to have turned upon what happened to the corn and how the vendor dealt with it before he could deliver. New terms and unauthorised terms were imposed upon the purchaser before he could get the corn.

There was no contract here to deliver at Regina—in short this case differs from *Corby v. Williams*, and also from *Calcutta and Burmah Steam Navigation Co. v. De Mattos* (1863), 32 L.J.N.S.Q.B. 322, which was cited.

The complete understanding between the parties in this case, so far as expressed and as may be implied from their dealings, and particularly from the acceptance and payment for part of the apples of this contract, was, that, upon the apples being shipped f.o.b. for the defendants, the plaintiff would send forward the bills of lading representing the apples, and would draw at sight for the price; and that, upon arrival of the apples at Regina, and upon payment of freight and the price, the defendants would get the apples. There was no dealing with the apples in any such way as to put it out of the power of the defendants to get their apples. What was done was the ordinary course of business. Mr. Laird realised this. He made no objection at Regina other than asserting his right to inspect and to the condition of part of the apples in regard to which he knew, from the weather and from information in his possession, what inspection would disclose. There was no intention by the plaintiff in this case, by taking the shipping bill as he did, to reserve any right to dispose of the apples. And, as I have said, there was not any time after the apples reached Regina, before the defendants absolutely rejected them, when the defendants could not have obtained them on their own terms according to their contract. The contract to deliver f.o.b. was that the apples were to be for account of the defendants as soon as delivered on board the cars at Belleville.

The bills of lading were taken to the plaintiff's own order or to the order of the Bank of Montreal, and forwarded to the Bank of

Montreal as agents of the plaintiff, only that the bank might get the defendants' acceptance on handing the apples over, and with the intention not of preventing the passing of the property but of controlling the possession only. The bills of lading were indorsed to the order of the defendants.

These facts, which are warranted by the evidence and which I find, bring the case within *Browne v. Hare* (1859), 4 H. & N. 822. Very many cases were cited. I have consulted all of them. In addition to the cases mentioned above, I may mention the following as touching the question of when property vests in the purchaser and the right to inspect: *Inglis v. Stock* (1885), 10 App. Cas. 263; *Joyce v. Swann* (1864), 17 C.B.N.S. 84; *Craig v. Shaw* (1903), 2 O.W.R. 449; and see Benjamin on Sale, 5th ed., p. 753.

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The plaintiff is entitled to.....	\$1,558.75
Int. say 2 yrs. 7 mos. at 5%	201.32
	<hr/>
	\$1,760.07

It was agreed by counsel at the trial that, if the plaintiff succeeded, the amount of the counterclaim should be deducted from the amount of the plaintiff's claim.

The amount of this claim is.....	\$223.70
Allowing int. at 5% 2 yrs. 7 mos.	28.89
	<hr/>
will make	\$252.59

This amount will be deducted from the plaintiff's claim, and the plaintiff will be entitled to judgment for the balance of \$1,507.48, with costs.

The defendants should get costs of counterclaim as costs of set-off. I fix these costs at \$50, which amount will be deducted from the plaintiff's costs as taxed.

The defendants appealed from the judgment of BRITTON, J., and the appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ., on the 9th November, 1909.

H. Cassels, K.C., for the defendants. The contract between the parties was that the apples should be shipped "f.o.b. Ontario,

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cash on delivery at Regina," and the trial Judge held that they had been delivered to the defendants when they were put on the cars at Belleville, and that they were thereafter at their risk, although the defendants had no agent there and no opportunity of inspecting the goods. It is submitted that the trial Judge begged the question at issue in holding that the delivery to the defendants took place at Belleville. Although it may be the case that the *primâ facie* interpretation of the words "f.o.b. Ontario" might lead to that conclusion, they must be considered in connection with the other term of the contract, *viz.*, "cash on delivery at Regina," which, taken in connection with the fact that the bills of lading were made out either to the plaintiff's own order, or to the order of the Bank of Montreal, shew that the intention of the parties was that the property in and control over the goods should remain in the plaintiff, and that the defendants should have no property in or power over them until they were paid for at Regina and delivered to them there. The case of *Thomson v. Dymont*, 13 S.C.R. 303, cited by the learned trial Judge, does not decide the point in question here, and *Ex p. Rosevear China Clay Co.*, 11 Ch.D. 560, also cited by him, is really an authority for the defendants' contention. He also cites *McLean Produce Co. v. Freedman*, 12 O.W.R. 1038, but in that case the goods had been sold on sample, which had been approved by the purchasers. *Corby v. Williams*, 7 S.C.R. 470, a case which is referred to in the judgment below, is an authority in the defendants' favour, and, it is submitted, is not successfully distinguished from the present case by the trial Judge. Probably the nearest case to the present is *Calcutta and Burmah Steam Navigation Co. v. De Mattos*, 32 L.J.N.S.Q.B. 322, which was affirmed in (1864), 33 L.J.N.S.Q.B. 214, and is in favour of the appellants' contention. *Inglis v. Stock*, 10 App. Cas. 263, referred to by the trial Judge as an authority against the defendants, is an insurance case in which the Court would be disposed to strain the law in favour of the insured. See the case in the Court below, *Stock v. Inglis* (1884), 12 Q.B.D. 564. *Joyce v. Swann*, 17 C.B.N.S. 84, also cited in the Court below, is in our favour. See the judgment of Williams, J., at pp. 101-102.

McGregor Young, K.C., and *W. S. Morden*, for the plaintiff. It is undoubted law that under a contract f.o.b. the risk of loss must, in the absence of some stipulation to the contrary, fall on the

purchaser; also that where a party is seeking to vary the usual incidents of such a contract, the evidence of such variation must be clear and unmistakable. The term of the contract under which the goods were sent "cash on delivery at Regina," is only contained in the first letter of the correspondence between the parties, and the transactions with which that term is connected are not in question. The subsequent correspondence shews clearly that the intention of the parties was that the usual incidents of a contract f.o.b. should prevail, and that when the fruit was put on the cars at Belleville the plaintiff had discharged his obligation. As to the circumstance that the bills of lading were attached to the drafts and made out to the plaintiff, or to his agents, the Bank of Montreal, that could at the most raise a presumption in favour of the delivery at Regina, which may be rebutted and is rebutted by the evidence in the present case. It was merely the ordinary transaction of cash against bills of lading, and everything depends upon the intention of the parties. The following cases were referred to: *Cowas-jee v. Thompson* (1845), 3 Moore's Ind. App. 422, at pp. 430, 433; *Perkins v. Bell*, [1893] 1 Q.B. 193, at pp. 196, 197; *Oelrichs v. Trent Valley Woollen Manufacturing Co.* (1893), 20 A.R. 673, at pp. 678, 679, 681; and the same case in 23 S.C.R. 682, at pp. 693, 694; *McLean Produce Co. v. Freedman*, 12 O.W.R. 1038, at pp. 1042, 1043; *Towers v. Dominion Iron and Metal Co.* (1885), 11 A.R. 315; *Browne v. Hare*, 4 H. & N. 822; *Stock v. Inglis*, 12 Q.B.D. 564, at p. 573; *Inglis v. Stock*, 10 App. Cas. 263, at p. 268; *Crozier Stephens and Co. v. Auerbach* (1908), 24 Times L.R. 409.

November 23. The judgment of the Court was delivered by BOYD, C.:—The main question to be determined is whether the property in the apples was in the buyers or the seller, or, in other words, had the seller, the plaintiff, divested himself of all proprietary right in the goods? For, in the absence of any stipulation as to risk before completion of the sale, any loss or damage to the goods falls upon the owner: *res perit domino*. Delivery or actual possession of the goods is not the test: the terms of the contract, express or implied, have to be regarded to ascertain in whom the property is vested. The property may pass at once or at a future time or contingently on the fulfilment of some condition. This case falls to be determined not on any express provision but by arriving at the imputed intention of the parties.

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A quantity of apples of different grades and prices specified, ordered from Regina by the defendants, were placed on cars at Belleville by the seller, the plaintiff, in pursuance of one term of the contract, *i.e.*, "f.o.b. Ontario." They were to be carried to the North-West, and, according to another term of the contract, to be paid for "cash on delivery at Regina." It was argued that this latter term did not apply to the shipment of winter apples, but only to early shipments of summer fruit; but, whatever the construction of the letters, the seller acted on this view in shipping. The goods were sent with contemporaneous bills of lading made out to the seller or his agents, the Bank of Montreal, to be held against the arrival of the goods. Drafts at sight were also forwarded with the bills of lading, to be accepted and paid by the purchasers, and upon payment the bills of lading were to be handed over to the defendants. The invoice does not say that the goods are shipped on account of or at the risk of the buyers, whereas the bills of lading do shew that the goods were shipped as the property of the seller or his agents, the Bank of Montreal. It impresses me that the bill of lading is the significant document in this case, because it represents or is symbolic of the apples in question, and it is the best evidence of where the property in them is placed. The defendants, as the plaintiff admits, could not get the apples shipped without the bills of lading, and these they could not get without making payment of the draft for the price.

This litigation dates from what occurred in the transit—the apples, as is suggested, from want of proper care as to the use of heated cars by the railway company, became frozen and so practically unmerchantable for the defendants' purposes, and they refused to take them or pay for them.

As I construe the contract in writing and the dealings of the parties, the shipment "free on board" at Belleville was not a constructive delivery to the carrier for the purchasers; it was a delivery of possession to the railway company pursuant to the bill of lading and for the seller or his agents, the bank, at Regina; and no delivery of possession to the purchasers was contemplated till they accepted and paid for the apples at Regina. Till then possession and property were alike withheld by the seller, and in this view the property was to be divested from him and lodged in the purchasers first and only when payment was made.

This is a case of property not to be vested till the fulfilment of this condition. The learned trial Judge having found that the property vested at once upon shipment (in this giving chief emphasis to the "f.o.b." part of the contract) has arrived at a conclusion which, I think, is opposed to the later authorities; though I concede that the situation is one not free from grave doubt. Upon no question in commercial law has there been more divergence of judicial opinion than this same inquiry as to the vesting and divesting of the property in goods under contract of sale. I have been impressed by the observations of Mr. Justice Cresswell on this point in a Canadian appeal. He says: "It is impossible to examine the decisions on this subject without being struck by the ingenuity with which sellers have contended that the property in goods contracted for had, or had not, become vested in the buyers, according as it suited their interest; and buyers, or their representatives, have, with equal ingenuity, endeavoured to shew that they had, or had not, acquired the property in that for which they had contracted; and the Judges have not unnaturally appeared anxious to find reasons for giving a judgment which seemed to them most consistent with natural justice. Under such circumstances, it cannot occasion much surprise if some of the numerous reported decisions have been made to depend upon very nice and subtle distinctions, and if some of them should not appear altogether reconcilable:" *Gilmour v. Supple* (1858), 11 Moo. P.C. 551, at p. 566, quoted in *Anderson v. Morice* (1875), L.R. 10 C.P. 609.

It appears to me that when the seller selected the apples called for by the order and placed them in barrels on the cars "f.o.b. Ontario," he had to that extent appropriated the apples to the particular contract, but he had not done so unconditionally, by reason of the terms of the bill of lading. By these he had retained for himself and the bank the power of disposal or control till payment at Regina.

My justification for disagreeing with the judgment in appeal is founded on the law as expressed by Cotton, L.J., in *Mirabita v. Imperial Ottoman Bank* (1878), 3 Ex.D. 164, 172, which I cite: "If . . . the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself

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a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchasers. . . . If the vendor deals with or claims to retain the bill of lading, in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but, until acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance, etc., the property in the goods does not pass to the purchaser."

The learned Judge has founded his judgment on *Browne v. Hare* (1858), 3 H. & N. 484, and 4 H. & N. 822; but the facts there are unlike this case upon the cardinal point of difference. In *Browne v. Hare* the goods were shipped f.o.b., and a bill of lading was issued by which the goods were deliverable to the shipper's order, and this the shipper indorsed specially to the defendant (the purchaser). The shipper forwarded invoice, bill of lading, and bill of exchange drawn on the defendants, to the banker at the point of destination, for the purpose of collection. By the terms of the bill of lading the property was transferred to the purchaser, though it was not put in his possession, and it was to be handed over on payment. The invoice sent set forth that the goods were shipped on account of the purchaser (a note absent in the present case). The argument for the plaintiff brings out the very point of distinction between that and this case. He argued that the delivery was completed on the shipment of the oil and special indorsement of the bill of lading to the purchasers, and that so the property absolutely vested in the latter. . . . The plaintiffs never intended to preserve their right to it until the bill of exchange was accepted; for if so, they would have transmitted to their agent the bill of lading indorsed in blank, to be delivered only in case of the acceptance taking place. . . . The special indorsement to the defendants was with the intention to vest the property in them. . . . In the case of a blank indorsement, there must be a delivery to the party *as indorsee*, in order to constitute an indorsement to him . . . but a special indorsement operates to pass the property to the indorsee: 3 H. & N., pp. 489, 490.

These extracts from the argument shew the two sides of the

neat question which divides the authorities. *Browne v. Hare* was on one side; the manner of dealing with the bill of lading in this case is on the other.

A curious illustration of the operation of *Browne v. Hare* is afforded by *Ogg v. Shuter* (1875), as reported L.R. 10 C.P. 159, and S.C. (1875), 1 C.P.D. 47. The four Judges below held that the property passed by the intention manifested, relying on *Browne v. Hare*. But in appeal it was held by a strong Court that the fact of the bill of lading being indorsed to the vendor's agent differed the case from one where the indorsement was to the purchaser, and Lord Cairns said: "Where the shipper takes and keeps in his own or his agent's hands a bill of lading in this form to protect himself . . . such a hold retained under the bill of lading is not merely a right to retain possession till those conditions are fulfilled but involves in it a power to dispose of the goods:" p. 50. And the same Judge pointed out in *Shepherd v. Harrison* (1871), L.R. 5 H.L. 116, 131, that, even where the invoice expressly stated that the goods were shipped on account of and at the risk of the consignee, that was not conclusive, but might be overruled by the fact that the *jus disponendi* was reserved to the shipper through the medium of the bill of lading.

The importance of the frame of the bill of lading is brought out by the comment of Cotton, L.J., in *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q.B. 643, 662, upon the point decided in *Shepherd v. Harrison*; he says: "The whole point was whether the true owner had shewn that he intended to reserve to himself the *jus disponendi* in the goods so as to negative the inference that the property in them had passed to the person to whom the bill of lading indorsed in blank had been handed by the owner's agent together with a bill of exchange for the price for acceptance. The handing over of the bill of lading under such conditions did clearly not rebut the conclusive evidence from the transaction itself that the seller intended to preserve his *jus disponendi* until the acceptance of the bill of exchange, and that therefore no property in the goods passed to the plaintiff by the delivery of the bill of lading."

Some details of comparative minor importance may be referred to. As to the terms of the written contract, I think that the shipments cannot be divided into earlier and later apples, and these

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regarded as being handled under different contracts. The earlier letters are connected with the later by the intimation in the letter of the 11th August "that we will require other varieties at a later date." And, as I have said, the whole course of dealing was of the same character from the first.

The defendants' letter of the 15th October, as to not caring to take chances on having any frozen apples, is cited as shewing that the risk was taken by the defendants. This sentence should not be overweighted; it may have another import: they give warning or advice as to protecting the apples lest they may lose their trade by having no good apples. Whatever admission can be extracted from this, it is more than outweighed, in my opinion, by what is said in the plaintiff's letter of the 15th December: "It is true the title was in us till paid, but to all practical purposes they were your goods—you want us to take all risk of transit," etc. The plaintiff hits the precise point and admits that the title was to be in him till paid. That is, the property was still his during the transit, and on him consequently the misfortune of the loss falls.

The action should be dismissed with costs.

[BRITTON, J.]

RE MULHOLLAND AND MORRIS.

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Nov. 29.

Vendor and Purchaser—Title of Devisee under Will—Legacies Charged on Land—Executors—Trustees—Statute of Limitations—Application of Purchase Money—Requisitions as to Title—Waiver by Taking Possession.

The testatrix, dying on the 2nd May, 1904, by her will devised land to M., but charged thereon certain legacies and the payment of her debts and funeral and testamentary expenses, and exempted all the rest of her estate from liability therefor, and gave her executors (M. being one) power to mortgage or sell the land devised for the purpose of paying the sums charged thereon. The will was not proved. The executors on the 24th May, 1899, conveyed the land to M., and he was in possession until the 24th May, 1909, when a person to whom he had contracted to sell the land took possession. There was no assent to any legacy and no setting apart of any sum:—

Held, upon a petition under the Vendors and Purchasers Act, that neither the executors as such nor M. were trustees, and the legacies were barred by the Statute of Limitations; but, if not, that M. had the right to sell, and the purchaser was not bound to see to the application of the purchase money. *In re Henson, Chester v. Henson* (1908), 77 L.J.N.S.Ch. 598, followed.

Held, also, that the purchaser, having taken possession without any consent, and without any agreement, express or implied, and made alterations in the property, was not entitled to insist upon requisitions as to title being satisfied.

THIS was a petition under the Vendors and Purchasers Act in respect of a contract for the sale of land, dated the 24th December, 1908, between John Mulholland, as vendor, and John Morris, as purchaser. The facts are stated in the judgment.

The petition was heard by BRITTON, J., in the Weekly Court, on the 27th October, 1909.

H. W. Mickle, for the vendor, the petitioner.

G. M. Macdonnell, K.C., for the purchaser.

November 29. BRITTON, J.:—This application is by the vendor to compel the purchaser to complete his purchase of lot 10 Barrie street, Kingston, by paying the purchase money and interest, and that it may be declared that the legacies mentioned in the will of Bridget Mulholland have ceased to be a charge on the said land, and that, as the purchaser has taken possession of the said land, he is not entitled to claim, in opposition to completing the purchase, that certain requisitions as to title should be complied with.

The lot was owned by Bridget Mulholland, widow. She made a will on the 14th December, 1893, and a codicil on the 4th January, 1894. By her will she devised this lot to the vendor, John Mul-

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holland, but subject to the following charges: legacy to A.B., \$200; legacy to C.D., \$100; legacy to three nieces, \$50 each—\$150; in trust for adopted daughter, \$40 a year for five years after the death of the testatrix—\$200.

The will contains the following clauses:—

“Said six legacies, amounting together to \$650, I hereby charge on my said lot on Barrie street, and I exempt all the rest of my estate real and personal from the same.”

“On said lot I also charge the payment of my just debts, funeral and testamentary expenses, and I exempt the rest of my estate, real and personal, from all liability as to same.”

“For the purpose of paying the sums charged on my said lot on Barrie street, and also my debts, funeral expenses and testamentary expenses, likewise charged on said lot, I give my said executors full power to mortgage or sell said lot as they may think proper.”

The vendor and his brother James and Michael Brennan were appointed executors.

By the codicil an additional legacy of \$150 to another niece was given, and the gift of \$200 to her adopted daughter was revoked, and that amount was given to an institution for the care of the adopted daughter. A change was made in the disposition of the \$100 to C.D.

Bridget Mulholland died on the 2nd May, 1894. No probate of the will was obtained. The executor Michael Brennan died, as it is said, about thirteen years ago. The surviving executors, of whom the vendor was one, as such executors, on the 24th May, 1899, conveyed this lot to the vendor, and he has been in possession of the lot by himself and his tenants until taken possession of by the purchaser.

On the 19th December, 1908, the purchaser offered \$1,800 for the lot, and made a deposit in money of \$100 on account of the price.

On the 5th January, 1909, the solicitors for the purchaser made requisitions upon the vendor's solicitor, amongst other things (which need not be considered, as apparently they can be satisfactorily met), that there should be registration of releases of the legacies named in the will. The vendor's solicitor replied that these legacies are barred by the Statute of Limitations. The purchaser declined to accept that answer.

Negotiations followed, which have not resulted in any satisfactory conclusion.

While the long drawn out negotiations were pending, the purchaser, about the 24th May, 1909, took possession of the property, and made substantial and material changes in the building, and now refuses to give up possession and insists upon retaining his purchase.

The vendor makes the present application.

As to legacies being barred by the Statute of Limitations, an executor is not, as such, an express trustee. "Where . . . the same person is named in a will as executor and as trustee of a legacy, then as soon as he has assented to the legacy as executor, and has set apart a sum of money to answer it, he holds it in his character as trustee, and time does not run against the *cestui que trust*:" see Lightwood's Time Limit on Actions (1909), p. 172. The cases cited, in my opinion, warrant the text.

Here the executors were not named as trustees, nor was the devisee-executor named as such. By the will \$200 was given in trust for the maintenance of Agnes Little, but that gift was revoked by the codicil, and there was another disposition made of that sum. There has been no assent to any legacy and no setting apart of any sum. "Where the money representing a legacy has not been actually raised, but is charged on land and secured by an express trust, the trust does not prevent the operation of the statute, and it is recoverable only within the same period as if there were no trust:" see Lightwood, p. 173, and authorities cited. Accepting the affidavit of the vendor, the legacies in question are barred. In the present proceedings the legatees are not before the Court, and consequently they are not bound by any decision upon that point. See also *In re Davis, Evans v. Moore*, [1891] 3 Ch. 119.

Whether the legacies are barred out or not, the vendor has the right to sell, and the purchaser is not, in my opinion, bound to see to the distribution of the purchase money. I accept, upon that point, the recent case, cited on the argument, *In re Henson, Chester v. Henson* (1908), 77 L.J.N.S. Ch. 598. At p. 601 Swinfen Eady, J., says: "Where legacies alone are charged, the purchasers of the real estate are bound to see to the application of the purchase money. Where debts are charged generally, or where debts and legacies

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are charged generally, the purchasers of the real estate are not bound to see to the application of the purchase money."

It might be argued that the words of the will in question, "Said six legacies . . . I hereby charge on my said lot on Barrie street, and I exempt all the rest of my estate real and personal from the same," distinguish this case from the one cited. I think not. These words must be taken with the following: "I also hereby charge the payment of my just debts, funeral and testamentary expenses, and I exempt the rest of my estate real and personal from all liability as to same."

The will, therefore, as to lot 10 and the sale of it, is the same as if there was no other property, and as if this lot was charged generally with the payment of debts and legacies. This is, I think, disposed of by a further reference in the case cited, p. 601, to the remarks of Lord Lyndhurst in *Johnson v. Kennett* (1835), 3 Myl. & K. 624, 631: "But it is said that the debts having been paid, and paid out of the personal estate, and nothing remaining but the legacies, the case falls within the general rule applicable to cases where legacies alone are charged upon the real estate. I find no authority for such a proposition. The rule applies to the state of things at the death of the testator; and if the debts are afterwards paid, and the legacies alone are left as a charge, that circumstance does not vary the general rule."

Then as to possession. There is a direct conflict between the purchaser and the vendor as to how or why the purchaser did take possession. I must deal with it as if the purchaser went into possession without any consent, or under any agreement, express or implied. If the purchaser was claiming error in description or quantity of land, and this could be established, he might be entitled to abatement, notwithstanding his going into possession; but that is not this case. He took possession because he wanted the property and intended to keep it. He refused to accept his deposit and refused to give up possession. He has altered the building to his own liking and for his own convenience and profit.

I have carefully read the affidavits filed, and, so far as possession is concerned, I go outside of the affidavits where in conflict and deal with undisputed facts. The purchaser, having taken possession and altered the property, is not entitled to insist that the requisition as above mentioned should be complied with.

The purchaser must complete his purchase by paying the purchase money and interest thereon at five per cent. per annum from the 24th day of May, 1909—date of his taking possession.

There is no reason for taking this out of the ordinary rule, so the purchaser must pay the costs of this application.

As to possession see *Calcraft v. Roebuck* (1790), 1 Ves. Jr. 221.

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[DIVISIONAL COURT.]

RYAN v. McINTOSH.

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July 12.

Dec. 4.

Negligence—Leaving Horses Unfastened and Unattended on Highway—Injury to Persons on Highway—Liability—Finding of Trial Judge—Appeal.

It is not negligence *per se* to leave a horse standing in a highway unfastened and unattended; it is a question of fact for the jury or other trial tribunal whether the owner of the horse was negligent in so leaving him.

A pair of quiet horses attached to a waggon laden with hay were allowed to stand on a country road unfastened, the reins being thrown on the ground, while the driver attempted to adjust the load. The hay fell from the waggon, and the horses, being startled, ran away, overtook the plaintiffs, who were driving along the highway in a buggy, and injured them. The trial Judge (BRITTON J.) found that the driver was not negligent, and a Divisional Court (TETZEL, J., dissenting) affirmed his finding.

Illidge v. Goodwin (1831), 5 C. & P. 190, explained and distinguished. Review of the authorities.

ACTION by Martin Ryan and Margaret Ryan, husband and wife, to recover damages for injuries sustained by them by reason of the negligence of the defendants, or one of them, as alleged. The facts are stated in the judgments.

The action was tried by BRITTON, J., without a jury, at Goderich, on the 24th June, 1909.

F. H. Thompson, K.C., for the plaintiffs.

J. M. Best, for the defendants.

July 12. BRITTON, J.:—The defendant Ernest McIntosh on the 9th October, 1908, was proceeding westerly along that part of the Huron road lying between the townships of McKillop and Tuckersmith, driving a pair of horses attached to a waggon which had upon it a large load—more than a ton—of hay. The part of the road where the accident happened was in good condition—plenty of road-bed on the travelled part, and no ditch on either

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side of the road. At this point the load of hay, which possibly had not been carefully put on the waggon, shifted to the right-hand side, and slid partly off the waggon. The defendant Ernest McIntosh stopped his horses and slid down from the load, holding the reins in his hands. These reins he placed on the ground, and went to the rear of his waggon to see what the trouble was. He then saw that his only plan was to remove the whole or the greater part of his load. To do this it was necessary to loosen his binder, which was then, by reason of the changed position of the load, very tightly held. He could not loosen it without help, and he called to his assistance a person who happened to be driving along the road at that time. Ernest McIntosh pulled the end of the binder down, and the other man unhitched the hook. Ernest McIntosh then let go, and the binder fell to the right or north side of the road, and with it followed a portion of the load of hay. At that moment the horses started, probably startled by the noise of the falling of the binder or the hay, or possibly some of the hay fell upon or close to the horses or one of them. They ran, drawing the waggon, which soon was relieved of the rest of the load, and, running westerly, overtook and ran upon a buggy or waggon drawn by one horse and driven by Martin Ryan, one of the plaintiffs, the other plaintiff being with him.

Margaret Ryan was very severely injured, and Martin Ryan was slightly injured. The plaintiffs had passed the load of hay as it stood by the side of the road. Their horse was being driven slowly, and the first they knew of the danger was when the team of horses ran into them.

It was admitted that Ernest McIntosh, at the time of the accident and in driving these horses, was acting for his brother, the other defendant, about their joint business.

The negligence charged is that Ernest McIntosh left the horses unattended, by reason of which they were able to run away, and they did run away and did the damage complained of.

Was the defendant Ernest McIntosh guilty of negligence which caused the accident?

In *Sullivan v. McWilliam* (1893), 20 A.R. 627, it was held not negligence *per se* for the driver of a horse of quiet disposition, standing on the street, to let go the reins while he alighted from the vehicle to fasten a head-weight, there being no noise or dis-

turbance to frighten the animal, and that the owner of the horse was not responsible for damages caused by the horse in running away, the horse being frightened by a sudden noise just after the driver had alighted.

There is no doubt that, if there had been a jury, I should have been compelled to leave the case to them. The defendant Ernest McIntosh would be obliged to explain, as far as he could, how it came about that on a good road these horses ran away; but then the jury would have to say, upon that explanation and upon all the evidence, whether there was in fact negligence.

There is abundance of authority that if a driver leaves his horse absolutely unattended in a busy street, or where there is, or in the natural order of things may be, anything to start the horse or startle him, that would be negligence. The character of the horse must be considered, as well as the locality. Here the horses were quiet, proved to be so before the defendants got them, known to the defendants to be so; the road was good and level; there was nothing in sight upon the road likely to frighten a horse, no automobile or bicycle or dog or any animal at large, no traffic at that time on that part of the road, other than the plaintiffs, the defendant Ernest McIntosh with his load, and the man who came to his assistance.

It was contended that, as the defendant Ernest McIntosh could not get to the reins by going directly on the north side of the load to the place where they were, it was the same as leaving the horses unattended and going into a house. It is true that, by reason of the toppling over of the load after the loosening of the binder, the way was blocked on the north side; but the driver was never farther away from the horses' heads than the distance to the rear end of his load. The suddenness of the start, which prevented the driver getting to the heads, would, in my opinion, have prevented his reaching the reins, even if the way had been clear along the north side of the waggon.

Then it is suggested that the defendant Ernest McIntosh was negligent in the manner of loosening the binder and allowing it and the hay to tumble off. I do not see what other thing, in the light of all that was present to the defendant Ernest McIntosh's mind, would have suggested itself.

The defendant Ernest McIntosh could, before attempting to

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interfere with his load, have unhitched his horses from the waggon, turned their heads to the fence, and tied them there. If there was, or if there should have been, present to his mind anything to suggest or warn that his horses might start, he should have unhitched or taken precautions against their doing so. I am not prepared to hold that in every case a driver, with a horse known to be quiet, who drops his lines, is guilty of negligence. If not in every case, then not in this case.

Did the defendant Ernest McIntosh do anything that a reasonably prudent man, in the circumstances, would not have done, or did he omit any precaution that a reasonably prudent man would have taken? By this standard, I am of opinion that the defendant Ernest McIntosh was not guilty of negligence.

It appeared in the evidence that the defendant Ernest McIntosh was willing to contribute something tangible towards reducing the loss to Margaret Ryan, who was very badly injured, and suffered great pain. I hope he will even yet do so.

I did not understand the defendants to ask costs, so there will be judgment for the defendants dismissing the action without costs.

If, in the opinion of a Divisional Court, the plaintiffs are entitled to recover, in my opinion the damages should be for Margaret Ryan \$300 and for Martin Ryan \$100 for his injury and pain and to include medical services for himself and wife and nursing for his wife.

The plaintiffs appealed from the judgment of BRITTON, J., and their appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., TEETZEL and RIDDELL, JJ., on the 7th October, 1909.

F. H. Thompson, K.C., for the plaintiffs. The defendant Ernest McIntosh was guilty of negligence (for which both defendants are liable), in leaving the horses unattended, and the injuries to the plaintiffs were the result of this negligence. He did not do what a reasonable man would have done in the circumstances. He should have unhitched the horses and tied them to the fence, or secured them in some way before loosening the binding pole. And at any rate he should have kept the reins within his reach, which he did not do: *Illidge v. Goodwin* (1831), 5 C. & P. 190;

Wasmer v. Delaware Lackawanna and Western R.R. Co. (1880), 80 N.Y. 212, 217; *Beven on Negligence*, Can. ed., p. 545; *Engelhart v. Farrant*, [1897] 1 Q.B. 240; *Myers v. Sault Ste. Marie Pulp and Paper Co.* (1902), 3 O.L.R. 600.

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J. M. Best, for the defendants. There was no negligence on the part of the defendants, and the learned trial Judge's judgment should not be disturbed. In the cases referred to on behalf of the plaintiff the horses were absolutely unattended, which was not the case here. Ernest McIntosh acted as a reasonable man would have done. There was nothing likely to frighten these quiet horses, on a country road. I rely on *Sullivan v. McWilliam*, 20 A.R. 627.

Thompson, in reply. This was not a country road in the usual sense, but a much travelled highway. In *Sullivan v. McWilliam* the lines were within reach; here they were not.

December 4. FALCONBRIDGE, C.J.:—It appears to me that unless we can say that what the defendant Ernest McIntosh did or failed to do here was negligence *per se*, this judgment cannot be disturbed.

If there had been a jury, could they have been directed to find one way or the other? Surely not. The case must have been submitted to them, and if they had found in favour of the defendants, could we say that they were wrong?

Here a Judge of great practical experience has found that the defendant Ernest McIntosh was not guilty of negligence. His opinion ought to be treated with some deference. His finding is not based on misapprehension of any fact or facts such as was pointed out in *Beal v. Michigan Central R.R. Co.* (1909), 19 O.L.R. 502. Here the facts are clear, are not in dispute, and were fully grasped and apprehended by the trial Judge.

I think, therefore, on principle, that we ought not to interfere, unless we thought he was clearly wrong. But I am also of opinion that the learned Judge has come to the right conclusion.

The appeal must be dismissed, with the usual penalty of costs.

RIDDELL, J.:—Most of the argument on the part of the appellants is based upon the dictum of Tindal, C.J., in *Illidge v. Goodwin*, 5 C. & P. 190, at p. 192. In that case the defendant's cart had

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backed against the window of the plaintiff's shop in St. Paul's Churchyard, London, which of course is not a "churchyard" at all but a very busy main street. The cart and horse had been left unattended by the defendant's servant. The defendant called witnesses, one to prove that the horse had been struck by a person passing by, and another that the horse had backed against the window in consequence of the bad management of the plaintiff's shopman, who came out and laid hold of his head. During the cross-examination of the second of these witnesses, the jury interposed and said they did not believe the evidence of either of them. It was then that the Chief Justice said, according to the report: "After all, supposing them to be speaking the truth, it does not amount to a defence. If a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done." It has been argued that this meant that the very act of leaving a horse untied and unattended is *ipso facto* wrongful, and that, if mischief result in any way conditioned on such act, the owner is liable. That is not at all what the Chief Justice meant, as an examination of the case will shew. Of course every dictum, like "every judgment, must be read as applicable to the particular facts proved, or assumed to be proved:" *Quinn v. Leathem*, [1901] A.C. 495, at p. 506. Evidence had been given that the horse was, according to the admission of the person ultimately held by the Court to be the defendant, viz., Goodwin senior (see p. 193), given to backing; and this defendant had further admitted that it was very wrong for the man to leave it in the street (p. 191). Of course, this evidence would have been unnecessary and wholly irrelevant if as a matter of law the leaving of any horse thus upon the street were an act of negligence. Counsel for the defendant, before calling his witnesses, said: "I shall shew that the horse was a very quiet one, and that a person passing by whipped him and made him move. . . . This will make it a question, whether it was such an accident as they are entitled to recover for, on the ground of negligence. Leaving a spirited horse is negligence; but leaving a steady one, which would not move if left to himself and not struck, is not negligence." The evidence already spoken of was then given for the defendant, apparently without objection, and, upon this being disbelieved by the jury, the celebrated remark of the Chief Justice was then made.

It is obvious, I think, that all that was meant was, "If a man leave his horse in such a manner that a third person may use him to do immediate damage, the intervention of the third person will not relieve the owner from liability." The dictum does not mean that the act of leaving the horse was in itself necessarily wrongful; but that, if it were wrongful, the intervention of another wrongdoer was not effective as a defence in the action against the original wrongdoer. It is always cited for some such proposition. For example, in *Myers v. Sault Ste. Marie Pulp and Paper Co.*, 3 O.L.R. 600 (affirmed in *Sault Ste. Marie Pulp and Paper Co. v. Myers* (1902), 33 S.C.R. 23), the defendants had left a cog wheel in such a condition that a fellow workman of the plaintiff could pull away a short step ladder placed over the wheel (which ladder the plaintiff must use to climb over the wheel), thereby leaving the wheel exposed. It was ineffectively urged that the real cause of the accident was the wrongful act of the fellow workman. Armour, C.J.O., at p. 606, refers to *Illidge v. Goodwin* as an authority against this argument.

So in a number of English cases. *Clark v. Chambers* (1878), 3 Q.B.D. 327, at pp. 331, 332, cites the case itself, and also the well-known case of *Lynch v. Nurdin* (1841), 1 Q.B. 29, in which it is cited. In *Lynch v. Nurdin* Lord Dennan said (p. 35): "If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third . . . I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first:" and cites for authority *Illidge v. Goodwin*. The defendant had left his horse and cart unattended in the street, and the plaintiff, a child of seven years of age, was getting into the cart, when another boy made the horse move on, throwing down the plaintiff and breaking his leg. The horse had been left for half an hour in the open street while the servant was in an adjoining house (p. 34). And while it was taken for granted that that was negligent, the case is no authority for the larger proposition now contended for.

In *Clark v. Chambers* the question was one of original negligence, with alleged acts of intervention bringing about damage.

In *Engelhart v. Farrant*, [1897] 1 Q.B. 240, the servant of the defendant was delivering parcels with a horse and cart; there was

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a lamp in the cart, and on a particular evening the oil gave out, and the servant drove to a house to get more oil. He left the horse and cart and went into the house. While he was gone a lad of seventeen, who went with the cart to deliver the parcels to the customers, drove on and ran into the plaintiff's carriage, injuring it. The County Court Judge held the defendants liable; and his judgment was sustained by a Divisional Court. Upon appeal to the Court of Appeal, Lord Esher, M.R., considered that the case depended upon the doctrines with regard to the liability of an employer for the consequences of a negligent act of his servant, and that the driver, had he "been properly careful, when he drove to a house to get more oil, should have made the lad get out and get the oil, and he himself should have remained looking after the horse and cart." Consequently he held that the servant was negligent. Lopes, L.J., says: "In order that the plaintiff may recover, there must be negligence and negligence causing the injury. . . . Mears (the driver) left the cart and horse in the street unattended, and for this, if nothing more had taken place, the defendant would be liable . . . for it was negligence on his part. Mears had been cautioned not to leave the cart and horse unattended, and on a previous occasion had been corrected for so doing. . . . The negligence of Mears was not disputed. . . . It was Mears's blameable carelessness . . . which was the real moving and effective cause of the mischief." Rigby, L.J., says: "The County Court Judge has found that Mears was negligent. About that there can be no doubt at all, and he has found it as a fact."

So also in Australia. In *Melbourne Tramway Co. v. Spencer* (1888), 14 Vict. L.R. 95, the defendant left his cart and horse in the road, having one of the wheels of the cart fastened by a chain round the felloe between two of the spokes of the wheel, and then to the step. He went into the town hall on business, leaving his horse and cart without any one in charge of the horse or any one to watch it; he remained in the town hall about ten minutes. While he was in the town hall, the horse dragged the cart slowly across the street, a stranger jumped into the cart, the chain broke, and the horse ran away; the cart collided with a horse of the plaintiff and killed it. The full Court held that there was evidence of negligence on the part of the defendant to be submitted to a jury. *Illidge v. Goodwin* and *Clark v. Chambers* were cited.

Supposing then the dictum in *Illidge v. Goodwin* to be sound—and it has not escaped attack—see Beven on Negligence, Can. ed., p. 545—it is no authority for anything of importance in the present action, there having been no intervening agency except that of the defendant himself. This conclusion would not be of much use here, if it were to be considered that the act of the defendant in leaving, or rather having, his horse untied, was in itself negligence. This is not destitute of authority.

Hagarty, C.J., says, in *Chase v. McDonald* (1875), 25 C.P. 129: "The common case of a driver or rider leaving his horse temporarily without control on a street or road" is a case of alleged "negligent management or user of a horse by the defendant on a highway" (p. 130).

In *Walton v. London Brighton and South Coast R.W. Co.* (1866), H. & R. 424, 14 W.R. 395, the plaintiff's horse and cart were standing at his shop door unattended, and close behind them were drawn up the defendants' horse and cart, also unattended. The defendants' cart came into collision with the plaintiff's cart, and the plaintiff's horse broke through the plaintiff's shop window. The plaintiff's horse was young—about four years old—and quiet. The defendants' was a quiet old horse, long accustomed to the kind of work. The learned County Court Judge told the jury that the first question for them to determine was whether the defendants' van caused the accident, and whether the same was brought about by the negligence of the defendants' servant. He ruled, however, that there was no evidence of such contributory negligence as would disentitle the plaintiff to recover. The jury found for the plaintiff. Upon the appeal it was not contended that the act of the plaintiff leaving his horse unattended was *ipso facto* negligence, but only that it was evidence of negligence. The Court, Willes, Keating, and Montague Smith, JJ., held that there was evidence of negligence on the part of the plaintiff, and sent the case back for a new trial: Keating, J., saying (14 W.R. at p. 397): "It appears to me that there clearly was evidence of . . . contributory negligence on the part of the plaintiff. I cannot say what effect it might have had, or will hereafter have, on the jury, but I cannot for a moment doubt that there was such evidence to go to them." And Willes, J., saying (p. 397): "Both were left in the street with no one to take care of them, and the

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Judge left it to the jury that there was undoubted evidence of negligence on the part of the defendants, whether or not there was any evidence of negligence on the part of the plaintiff; and on that evidence the jury determined. But, in finding negligence on the part of the defendants, there was involved this, that there was also evidence of negligence on the part of the plaintiff." It is quite clear that the Court thought that it was for the jury to find whether leaving the horse unattended was negligent in fact.

So, too, in the case in our own Court of Appeal cited by the learned trial Judge, *Sullivan v. McWilliam*, 20 A.R. 627, the whole matter is considered one of fact; and the Court disagreed with the County Court Judge in respect of his finding that the case disclosed by the evidence was one of actionable negligence: see pp. 628, 629.

And the remarks of Esher, M.R., in *Engelhart v. Farrant*, [1897] 1 Q.B. 240, at p. 244, on *Mann v. Ward* (1892), 8 Times L.R. 699, may also be referred to.

The matter has come up more than once in the Courts in the United States.

In *Frazer v. Kimler* (1874), 2 Hun (9 N.Y.S.C.) 514, the defendant's horse had been left standing unhitched in a street in the city of Lockport in charge of a boy of fourteen years of age, who was not in good health. The lad sitting in the waggon, the horse ran away and did the damage complained of. Evidence was given tending to shew that the horse had run away on several previous occasions to the knowledge of the defendant. It was held that it was the duty of the defendant, knowing that the horse was liable to run away, to secure him if he left him standing in the street, or to put him in charge of a person capable of taking care of him.

Wasmer v. Delaware Lackawanna and Western R.R. Co., 80 N.Y. 212. The plaintiff's intestate was peddling kindling wood in a street with a horse and waggon. These he left near the sidewalk while he stepped across the walk about six feet from the waggon to solicit custom. The horse was left unfastened. A train of the defendants frightened the horse, which ran away. It was held that, in the absence of proof that the horse was vicious, unsafe, or unmanageable, it was not negligence *per se* for the plaintiff's intestate to leave his horse unfastened when he was near enough

so that he might reasonably expect to control him in an emergency by his voice or to reach him before he could escape.

Wasmuth v. Butler (1895), 86 Hun (93 N.Y.S.C.) 1. "The horse, which was driven to a light cart in delivering newspapers, was left by the driver standing in the street, unfastened and not watched, while the driver went inside a neighbouring building and shut the door behind him. While thus left alone the horse became frightened and ran away . . . overtook" the plaintiff "from behind, collided with her waggon and threw her out," causing the injury sued for. The Court, as it was held in General Term, properly submitted to the jury the question whether the act of the defendant's servant in leaving the horse untied and without supervision on the street of a city was negligence. The Court in General Term indeed went further and said that if the jury had answered that question in the negative it would probably have been a question for the Court, on a motion for a new trial, whether the verdict was not so manifestly opposed to the experience and judgment of mankind as to necessitate the granting of the motion, adding: "It has become almost proverbial that no horse is safe to leave untied on the street." The Court in that instance, however, was speaking of the streets of Buffalo; if the adage is intended to be of general application, I cannot agree. In the experience of Canadian farmers hundreds and thousands of horses have been found perfectly safe to leave untied upon the ordinary roads of the country.

McMahon v. Kelly (1890), 9 N.Y. Supp. 544. The driver of a team upon a dock took off the bridles at the noon hour and proceeded to feed the horses, "pretty good-spirited animals, a spirited team;" the driver himself sat on the string piece of the dock, about five feet away from his team, eating his lunch; a passing tow-boat blew a sharp shrill whistle, frightening the horses, which started to run. The driver ran after them, but could not catch them before they ran into and injured a horse of the plaintiff's. The trial Judge told the jury that the running away of the horses and consequent injury to the plaintiff's horse would not render the defendant liable, provided the jury found that there was no negligence on the part of the driver which caused them to run away or in not preventing them from running away. The Court said, "Here was an epitome of the law on the question of defendant's liability."

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The law in New York seems rather more favourable than ours to the plaintiff in cases of horses simply straying, *e.g.*, compare our law as laid down in *Chase v. McDonald*, 25 C.P. 129, with that of one at least of the Judges in the following case. In *Dickson v. McCoy* (1868), 39 N.Y. 400, the defendant negligently permitted his horse to go loose and unattended upon the sidewalk of a populous street in the city, where in passing he kicked the plaintiff. The defendant was held liable, Dwight, J., adding, "although it . . . was not proved that the horse was possessed of any vicious propensity or mischievous habit." While Grover, J., agrees generally in the result, he considers that the owner of the horse would not be liable had he not had notice that his horse was in the habit of running and kicking on the sidewalk.

In *Griggs v. Fleckenstein* (1869), 14 Minn. 81, the defendant left his team (with sleigh) standing on the principal business street of a town "without being hitched, fastened, held, or in any manner secured." The horses started, and, running violently down the street, struck another team, which, becoming frightened, also ran away and killed the plaintiff's horse, which was also unhitched and was standing by the side of the street. This horse, had he stood still, would not have been injured. It was considered that there was no doubt that the running away in the first place of the defendant's team was due to the negligence of the defendant (p. 94), but, in considering the question of the alleged negligence of the plaintiff, the Court said (p. 96): "It cannot be said that the fact of leaving the horse unhitched is in itself negligence; whether it is negligence to leave a horse unhitched, must depend upon the disposition of the horse, whether he was under the observation and control of some person all the time, and many other circumstances, and is a question to be determined by the jury from the facts in each case."

Park v. O'Brien (1854), 23 Conn. 339. The plaintiff drove his horse, a spirited animal, upon a town street, left him opposite a store unhitched and unattended, while he himself went into the store. The defendant was said to have driven his horse so negligently that the wheel of his waggon struck the plaintiff's carriage, frightening the plaintiff's horse, which thereupon ran away, upset the plaintiff's carriage, and broke it to pieces. The plaintiff introduced evidence to prove that, though his horse was spirited, it was

perfectly gentle and kind, so that a child of nine could safely drive him and had driven him without difficulty or trouble, that he had been thoroughly trained and accustomed to stand at all times unattended and unhitched, that the plaintiff never had hitched him, but had always left him unhitched and unattended, that the horse had never been known to become frightened or move from the place in which he was left. The defendant controverted all this by evidence. The Court held that it was not, as a matter of law, a want of ordinary care for the plaintiff to leave a spirited animal unfastened and unattended, but that it was properly left to the jury, as a question of fact under all the circumstances, and declared the proposition to be manifestly absurd "that the leaving of a spirited horse attached to a carriage, with no other knowledge of his disposition, habits or character, unfastened and unattended by a person, at any time, or in any place, or for any purpose, or for any period of time, or indeed under any circumstances," constitutes "a want of ordinary care" (p. 347).

In the Courts of England, Ontario, and the States of the American Union from whose reports I have quoted, it seems to have been constantly held that the question of negligence is one of fact. The question being one purely of fact, the findings of the learned trial Judge must be given due weight, according to the well-established principles. As these have been set out in *Beal v. Michigan Central R.R. Co.*, 19 O.L.R. 502, I do not see any advantage in reiterating them. While, of course, we could reverse this finding, as was done by the Court of Appeal in *Sullivan v. McWilliam*, we should not do so unless we were convinced that the trial Judge was wrong. So far from so thinking, I should upon the evidence unhesitatingly find in the same direction. I am of opinion that there was no negligence proved, and that the casualty was a mere accident. The plaintiffs must suffer the effects without recourse against the defendants.

The appeal should be dismissed with costs.

TEETZEL, J.:—The facts are not disputed, and the question simply is whether they disclose that the plaintiffs' injuries were the result of the defendants' negligence or of unavoidable accident.

The facts to be borne in mind in determining whether the defendant Ernest McIntosh was guilty of negligence are briefly these.

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He was in charge of a team of horses, aged nine years and five years respectively, which were usually quiet and never known to run away. He was driving with a load of hay to Seaforth upon one of the main thoroughfares of his county, being the leading gravel road between Stratford and Goderich, upon which there is a good deal of traffic. He had upon his waggon a load of hay, weighing about 2,900 lbs. When about half a mile from Seaforth, his load shifted to the right-hand side, and slid partly off the waggon. He stopped his horses and slid down from the load and laid the reins on the ground in front of the fallen load, and went to the rear of the waggon to investigate the trouble. He found that the load was partly on the ground, but the rack was hanging over the side of the waggon, which was not upset. He saw that the only thing to be done was to loosen the binding pole, so that the whole load would go off. The pole was fastened in front by a chain secured to the bottom of the rack, and, passing over the top of the load, was likewise fastened at the rear by a chain. Owing to the changed position of the load, he found the pole so tightly bound that he could not loosen it without assistance, and he called to his aid a lad who was passing. When they succeeded in loosening the rear end of the pole, he let it go, and the pole and the balance of the load fell to the ground. At that instant the horses started on a gallop, before he had time to get the lines, to do which he would have had to pass around the load, then lying on the ground.

Whether the pole struck the horses' heels, or whether a portion of the hay fell upon them, or whether it was the rattle of the slackened front chain of the binding pole, or other noises caused by casting off the load, or what was the particular cause of frightening the horses, was, upon the evidence, only a matter of conjecture.

The defendant Ernest McIntosh, at pp. 41-42 of his evidence, says:—

“Q. Then in the loosening of the binder, what is your theory as to what started the horses? Well, I can't say, without some hay or something fell on their heels—it may have—I was not there to see it; I can't say it did. It must have been something of that kind started them.

“Q. When you loosened the binder, would it swing around so

that the front end of the binder would come around and strike the horses? A. No, your Honour; I don't think it possible. The binder fell right down. The front end of the binder would be probably five or six feet from the horses on the right-hand side. I don't think the binder could touch them.

"Mr. Thompson: Q. The chain would rattle down the front of the load when you did that? A. Well, to a slight extent, not a great deal.

"Q. Of course, that might have started them, mightn't it? A. It may have. I can't account for what started them.

"Q. That seems to be very natural; or some hay might have fallen, as you said before? A. Yes.

"Q. But your object in doing this was to unload 29 cwt. of hay by dumping it in one bundle? A. That is what I was trying to do.

"Q. That is what you did? A. Yes.

"Q. And at that instant those horses went? A. Yes."

The conclusion is irresistible that, whatever the immediate cause of the sudden starting of the horses was, it arose out of what was done in casting off the load.

The plaintiffs had driven past a few moments before the binding pole was released, and were run into and seriously hurt by the defendants' team.

In his judgment the learned trial Judge said: "There is no doubt, if there had been a jury, I should have been compelled to leave the case to them;" but upon the whole case he was unable to find the defendant Ernest McIntosh guilty of negligence and dismissed the action, but fixed the damages at \$300 for Margaret Ryan and \$100 for Martin Ryan, so that, if a Divisional Court should be of opinion that the plaintiffs were entitled to recover, judgment might be entered for those sums.

With very great respect, I feel bound to differ from the conclusion of the learned trial Judge, for I am of opinion that the admitted facts establish a clear case of negligence against the defendant Ernest McIntosh, having due regard to the legal duty imposed upon every person who has charge of horses in a public highway to use reasonable and proper care and skill in their management and control, so as not to injure other persons using the highway.

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This duty is founded on common sense and the necessity for protection of life and property, and extends for the benefit not only of persons in the highway, but persons occupying adjoining property: see *Dulieu v. White*, [1901] 2 K.B. 669, at p. 671.

In determining whether a person in charge of horses in a highway is guilty of negligence, and therefore has violated this duty, no hard and fast rule can be laid down to fit every case, because what might be negligence in the circumstances of one case would not necessarily be negligence in the circumstances of another. For instance, the dictum of Tindal, C.J., in *Illidge v. Goodwin*, 5 C. & P. 190, that "if a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done," may be too sweeping to apply to every case. While this might be a proper rule of liability to impose in a crowded city thoroughfare, it would not follow that it should be applied as a test of negligence in a quiet country road.

In *Sullivan v. McWilliam*, 20 A.R. 627, it was held not negligence *per se* for the driver of a horse of a quiet disposition standing in the street to let go of the reins while he alights from a vehicle to fasten a head-weight, there being at the time little traffic and no noise or disturbance to frighten the animal, and the owner of the horse is not responsible for damages caused by the horse in running away when frightened by a sudden noise just after the driver alighted.

In that case, it is to be observed that the sudden noise was not caused by nor was it within the control of the defendant, nor was it within his reasonable expectation that it should occur. At p. 632, Maclellan, J. A., says: "The horse was quiet and accustomed to the streets. There was nothing unusual going on, or likely to happen, no crowd, no noise, no band of music."

As I have already said, the question in this case simply is, was the defendant Ernest McIntosh, under the circumstances, guilty of negligence which caused the plaintiffs' injury, or was it a case of unavoidable accident unaccompanied by negligence of either of the parties.

It is not pretended that the plaintiffs were guilty of any negligence.

The facts here being undisputed, we are in as good a position as the learned trial Judge was to form an opinion upon them, and

we have the right to review his finding, and the parties are entitled to our independent judgment. See *Fleuty v. Orr* (1906), 13 O.L.R. 59, and *Beal v. Michigan Central R.R. Co.*, 19 O.L.R. 502.

The learned trial Judge in the course of his judgment says: "The defendant Ernest McIntosh could, before attempting to interfere with his load, have unhitched his horses from the waggon, turned their heads to the fence, and tied them there. If there was, or if there should have been, present to his mind anything to suggest or warn that his horses might start, he should have unhitched or taken precautions against their doing so. I am not prepared to hold that in every case a driver, with a horse known to be quiet, who drops his lines, is guilty of negligence. If not in every case, then not in this case. Did the defendant Ernest McIntosh do anything that a reasonably prudent man, in the circumstances, would not have done, or did he omit any precaution that a reasonably prudent man would have taken? By this standard, I am of opinion that the defendant Ernest McIntosh was not guilty of negligence."

With very great respect, I think the learned trial Judge did not, in considering whether the defendant Ernest McIntosh acted as a reasonably prudent man, give full effect to the legal duty cast upon that defendant under the circumstances, or to the fact that the predicament in which the team and load were involved was an unusual and peculiar one, and that the extrication from it would subject the horses to an experience with which they would not be familiar and in connection with which their steadiness had not been tested.

Any one accustomed to horses, as the defendant Ernest McIntosh was, should know that it is never absolutely safe to subject the steadiest horse, without having control of him, to surroundings and conditions with which he is not accustomed, and which are calculated to excite a more nervous horse. For instance, no prudent farmer would, without the greatest precaution, think of subjecting his most quiet horse to the experience of passing an automobile for the first time.

It was not suggested that these horses had ever been in a position similar to the one they were placed in on the day of the accident; and it must also be borne in mind that one of them was only five years old. The defendant Ernest McIntosh ought to have

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known that there was danger of the pole or the chain or the hay striking one or both of his horses when the load was to be cast off, and that there would be noise and disturbance behind them in doing what it was necessary for him to do, and to which they were not accustomed.

As he would not be within easy reach of the reins if the horses should start, it was his plain duty, as a reasonably prudent man, either to have asked the plaintiffs as they passed to hold the horses or to have unhitched and tied them to the adjoining fence while he cast off the load.

I think the defendant Ernest McIntosh acted without a due regard to the safety of the plaintiffs and others upon the highway, and was guilty of improvident carelessness, amounting to great negligence, in not taking either of these courses, which would have prevented the accident.

Without attempting to lay down any general rule applicable to all cases of management of horses upon a highway, I think it would be regrettable and dangerous to the public safety to hold that a person is not bound to have his horses under control where, as in this case, they are being subjected to an unusual set of conditions to which they were never trained or accustomed. Surely a man who, trusting in the questionable reliability of unreasoning horses, chooses to leave them untied and unattended while he puts them through a new and as it must have been in this case an exciting experience, should be bound (adopting the language of Tindal, C.J., *supra*) to "take the risk of any mischief that may be done."

I would, therefore, allow the appeal and direct judgment to be entered in favour of the plaintiffs for the amounts fixed by the learned trial Judge, with costs of the appeal and of the action.

Appeal dismissed with costs; TEETZEL, J., dissenting.

[DIVISIONAL COURT.]

LEE V. FRIEDMAN.

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July 6.
Dec. 6.

Company—Wages of Labourers—Equitable Assignment—Unsatisfied Judgment Obtained by Assignee against Company—Action by Assignee against Directors—Irrregularity of Judgment—Validity—Ontario Companies Act, 7 Edw. VII. ch. 34, sec. 94.

The plaintiff, by an oral agreement between himself, an incorporated company, and the company's wage-earners, supplied goods to the wage-earners, to be paid for out of the wages. The plaintiff at the end of each month was to hand and did hand in to the company particulars of his account against the men, and the company was to keep out of the men's wages the amount of the account, and hold the amount for the plaintiff. The company was allowed by the plaintiff \$10 a month in part for its trouble in collecting. The plaintiff did not discharge the liability of the men for the goods bought by them until the money had been actually paid over by the company:—

Held, that there was a good equitable assignment of the wages; and, the company having debited the wage-earners' accounts with the amounts of the plaintiff's accounts for two months, and not having paid either the plaintiff or the wage-earners, the plaintiff was in a position to sue the company for the amount of his claim.

He did so, joining in one action with certain wage-earners, and, the company not appearing and not objecting, the plaintiffs in that action obtained a judgment against the company for the amounts of their several claims respectively. Execution against the company having been returned unsatisfied, the plaintiff, under sec. 94 of the Ontario Companies Act, 7 Edw. VII. ch. 34, sued the directors of the company for the amount for which judgment had been recovered by him alone:—

Held, that the judgment, though irregular, could not be attacked by the defendants, in the absence of fraud, which was not alleged; and the plaintiff, as an assignee of wages, came within sec. 94, and was entitled to recover against the directors.

Herman v. Wilson (1900), 32 O.R. 60, distinguished.

Judgment of TEETZEL, J., affirmed.

ACTION against the directors of the Wilbur Iron Ore Co. to recover the amount of a judgment for wages obtained against the company and remaining unpaid. The facts are stated in the judgments.

The action was tried before TEETZEL, J., without a jury, at Kingston, on the 15th June, 1909.

W. F. Nickle, for the plaintiff.

H. Guthrie, K.C., for the defendants.

July 6. TEETZEL, J.:—The plaintiff obtained a judgment against the Wilbur Iron Ore Co., an Ontario corporation, for \$346.27, in an action in which the plaintiff and others joined for separate amounts, their claim on the writ of summons being in-

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dorsed as a claim by assignees of wages due by the company to its labourers, servants, and apprentices. No objection was taken by the company to the joinder of the plaintiffs, and judgment was entered by default in favour of each for the amount claimed by him in the indorsement, and execution was issued and returned *nulla bona*.

The defendants are directors of the Wilbur Iron Ore Co.

The judgment was obtained and this action is brought under the Ontario Companies Act, 7 Edw. VII. ch. 34.

The plaintiff holds only an assignment in writing for \$9.40, and rests his claim, as owner of the balance, upon alleged equitable assignments from the wage-earners.

The plaintiff was a general merchant carrying on business near the company's mine, and I find the facts to be that, by a verbal arrangement between the plaintiff and the company and the company's wage-earners, the plaintiff supplied goods to the wage-earners, who on their part agreed that the plaintiff should be paid for the same out of wages earned or to be earned by them from the company; that the plaintiff at the end of each month was to hand in to the company particulars of his accounts against the several men, and the company was to take out of each man's wages the amount of the plaintiff's account against him and hold the same for the plaintiff. This was done for May and June, 1908, but, though the company's pay roll for July and August shewed that the men were debited with the plaintiff's accounts, neither the plaintiff nor the men were paid for those months. The company was placed in liquidation under a winding-up order on the 26th August, 1908.

I also find that to the amount of the plaintiff's judgment against the company he supplied goods to the wage-earners pursuant to the above arrangement, and that the company was indebted to the several wage-earners to an equivalent amount for wages.

I think the verbal agreement and the acts of all parties constitute an equitable assignment by the men to the plaintiff of sufficient of their wages which might be owing to them by the company to satisfy the plaintiff's accounts against them, and that the plaintiff is entitled to sue without joining the several wage-earners. See *Mitchell v. Goodall* (1879), 44 U.C.R. 398; *Armstrong v. Farr* (1885), 11 A.R. 186; *Trusts Corporation of Ontario v. Rider* (1897),

24 A.R. 157; *Re McRae Estate* (1903), 6 O.L.R. 238; *Hughes v. Chambers* (1902), 22 C.L.T. Occ. N. 333, 14 Man. L.R. 163.

I do not think that *Herman v. Wilson* (1900), 32 O.R. 60, relied upon by Mr. Guthrie, is applicable to the facts of this case. In that case the action was brought not for a debt or debts owing to labourers or servants of the company, but for money paid by the plaintiff for the company at the company's request, the plaintiff being its manager. At p. 63 Ferguson, J., says: "I do not see that the plaintiff's now asserting that he is the assignee of the amounts said to be owing to each of the other eleven persons can help his position. He does not make this statement in his pleading. I think this action must be considered as if no action had been brought against the company."

Judgment will therefore be in favour of the plaintiff for \$377.13 and costs.

The defendants appealed from the judgment of TEETZEL, J., and their appeal was heard on the 5th November, 1909, by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

H. Guthrie, K.C., for the defendants. The action is brought under sec. 94 of the Ontario Companies Act, 7 Edw. VII. ch. 34. In *Welch v. Evans* (1895), 22 A.R. 255, MacLennan, J.A., says, at p. 262, that this Act casts the burden of suretyship on the directors; "in fact, imposes upon the directors a penal liability for the default of the company." Viewing it as penal legislation, the Act must be construed strictly, and the plaintiff must comply strictly with its provisions. Now, the plaintiff has no written assignment for this claim, but only a verbal equitable assignment. There is no proper foundation for the action, considering the section. This action is brought for a much smaller amount than the amount of the writ of execution, which cannot be done under the statute. The plaintiff is assignee only of an equitable chose in action by a parol assignment, and to succeed he must have joined with him the assignors: *Turquand v. Fearon* (1879), 4 Q.B.D. 280. The only claim that can be recovered under the statute is a claim for wages, which this is not. This is a claim for goods supplied. It is a question of debt between the company and the plaintiff, and has lost its character as a wages claim. The section was framed

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to protect the wage-earner. The principle in this case is the same as in *Herman v. Wilson*, 32 O.R. 60.

F. Denton, K.C., for the plaintiff. A chose in action can be assigned. Sub-section 5 of sec. 58 of the Judicature Act provides for this. Writing is not necessary: *Armstrong v. Farr*, 11 A.R. 186. The claim has not lost its character as wages.

December 6. BRITTON, J.:—The defendants were directors of the Wilbur Iron Ore Co. Limited. The company was indebted to several of its labourers, and the plaintiff sues as assignee of certain claims of labourers of the company for their work.

The plaintiff's claim, at the outset, amounted in the aggregate to \$1,030.73. For such debts to labourers as amounted to \$691.96, part of the above, the plaintiff was paid, but the balance was disputed, for the reason mainly, as I gather from the evidence, that the plaintiff had no assignment in writing of these.

On the 15th March, 1909, the plaintiff, in an action in which others joined in respect of their own similar claims, sued the company. That action was not defended, and judgment was recovered by default against the company for the plaintiffs in that action, severally, for the amount claimed by each. The recovery in the plaintiffs' favour was for \$346.27, and the sum of \$24.82 was taxed as the costs of that action and in favour of all the plaintiffs.

A writ of execution at the instance of all the plaintiffs in that action was issued, for the amount due to all, which writ was directed to the sheriff of the county of Lanark, and that "execution against the company has been returned unsatisfied in whole."

Now, the present plaintiff parts company with his co-plaintiffs in the action against the company, and, upon the facts above stated, and under sec. 94 of ch. 34, 7 Edw. VII., sues the defendants as directors of the company. The case was tried at Kingston, and resulted in judgment for the plaintiff for \$377.13 with costs.

Upon the facts admitted and established by the evidence, I am of opinion that the plaintiff had an equitable assignment of the claims aggregating the amount sued for. A reference to the cases *Sovereign Bank v. International Portland Cement Co.* (1907), 14 O.L.R. 511, *Heyd v. Millar* (1898), 29 O.R. 735, *Quick v. Township of Colchester South* (1899), 30 O.R. 645, and *Palmer v. Culverwell* (1901), 85 L.T.N.S. 758, confirms me in the opinion expressed by me in *Re McRae Estate*, 6 O.L.R. 238.

Then, if there is a good equitable assignment, the plaintiff can sue, as he did, in his own name: Rule 203 (g).

The claims, originally, beyond question, claims of "labourers," within sec. 94, did not cease to be so until paid.

Upon the questions of fact I agree with what the trial Judge found—that the plaintiff did not release his claim against the labourers—and the amount, although admitted by the company, was not paid by merely crediting the amount to the plaintiff, and charging that amount to the labourer.

Herman v. Wilson, 32 O.R. 60, was cited as in the defendants' favour, but upon a reference to the case the facts will be found very different. The point of that case was that the plaintiff expended money *for the company* in payment of wages and other services. The learned Judge, referring to the plaintiff's action against the company, at p. 62 says: "That action was plainly not for a debt or debts owing to labourers or servants of the company, but for money paid by the plaintiff for the company at the company's request."

Here the action against the company was distinctly for debts due to labourers. I do not find any authority for saying that such a debt cannot be assigned, so as to give the assignee a right of action. On principle I do not see why such a claim should not be assignable. I am not able to hold that the action by the labourer must of necessity be a purely personal one—first against the company, and secondly against the directors, in order to recover his wages. A judgment was in fact recovered by the plaintiff against the company. It is no less a judgment against the company by the plaintiff because of the fact that others were joined with the plaintiff in the original action.

It was argued that the defendants could not go behind the judgment against the company to see whether the claim was really for labourers' wages, if on the face of the proceedings it appeared to be such a claim. I do not agree with that, but here it was established that the claim was really for wages and services performed by labourers.

The writ of execution against the company was directed to the sheriff of the county of Lanark, and was returned unsatisfied. The head office of the company was at Toronto. No writ of execution was issued to the sheriff of the county of York. The

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works of the defendant company were in the county of Lanark. The only property the company had, so far as appears, would probably be in that county. Section 94 is silent as to that, and does not in terms require the execution to be issued to the sheriff of the county where the head office of a company may be.

The plaintiff is in every respect within the wording of the section, and so entitled to recover.

The appeal should be dismissed with costs.

RIDDELL, J.:—The Wilbur Iron Ore Co. Limited, having its head office in Toronto, was sued on the 15th March, 1909, by Lee, Jackson, McGonigal, Richardson, and McMurtry, claiming as assignees of wages due from the company to the labourers, servants, and apprentices of said company, for services performed by them—the plaintiffs claiming, as such assignees, various sums: Lee \$346.27, Jackson \$196.05, McGonigal \$144.32, Richardson \$42.86, McMurtry \$9.30.

The company not appearing, judgment was signed on the 3rd April by the local registrar at Pembroke for the plaintiffs in one judgment—"adjudged that the plaintiffs do recover against the said defendants the several sums hereinafter mentioned, namely, Thomas Lee the sum of \$346.27, Hannah Jackson the sum of \$196.05," etc., etc.

A *fi. fa.* was issued, 5th April, upon this judgment and returned "no goods or lands" by the sheriff of Renfrew county.

Lee then sued the directors under the provisions of the Ontario Companies Act, 7 Edw. VII. ch. 34, sec. 94, for his claim.

My learned brother Teetzel tried the case at Kingston without a jury on the 15th June; and, after consideration, gave judgment in favour of the plaintiff.

The defendants now appeal.

At the trial the plaintiff did not content himself with putting in his judgment and the return of the sheriff, but he called evidence. He established the facts found by the learned trial Judge.

The plaintiff, by an agreement between himself, the company, and the company's wage-earners, supplied goods to the wage-earners, to be paid for out of the wages payable to them by the company, so far as they would go. The plaintiff at the end of each month was to hand, and did hand, in to the company particu-

lars of his account against the men; and the company was to keep out of the men's wages the amount of the account, and hold this amount for the plaintiff. This was done for May and June, 1908, but in July and August, 1908, while the men's accounts were debited with the amount of the accounts, neither the plaintiff nor the men were paid. Add now the facts that the company was allowed by the plaintiff \$10 a month (in part for its trouble in collecting), and that the plaintiff did not discharge the liability of a workman for the goods bought by him until he got the money actually paid over by the company, and I think all the facts of importance are stated.

I think that, whatever might have been the case under a slightly different state of circumstances, the men owed the plaintiff until he actually received the money from the company, the company owed the men until it actually paid the plaintiff, and the whole transaction was in effect an equitable assignment of the wages. The plaintiff rightly sued the company as an assignee of wages. The company did not object to the frame of the action; and the judgment, while irregular, cannot be attacked by a stranger for irregularity, in the absence of fraud, which is not here alleged: *Balfour v. Ellison* (1862), 8 U.C.L.J.O.S. 330; *Tait v. Harrison* (1870), 17 Gr. 458. This cures not only the irregularity of suing all claims as one, but also the irregularity (if it be one) of suing without the assignors being added as parties.

The judgment, then, is valid so far as these proceedings are concerned, even if a judgment in another action can be attacked here at all by a side-wind.

The judgment, then, is by an assignee of wages, and the sole question open is, "Do the provisions of the Act extend to the assignee?" The Act reads, sec. 94: "The directors of the company shall be jointly and severally liable to the labourers, servants and apprentices . . . for all debts not exceeding one year's wages due for services performed. . . ." Is this a personal and non-assignable right given to the labourers, etc., of the company?

The liability is a liability existing at all times, although it may not be enforceable by action—before the director can be sued certain proceedings must be gone through. But the liability exists. And the liability imposed by statute is not like a con-

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tract for personal service; there is no *delectus personæ* such as in *British Waggon Co. v. Lea* (1880), 5 Q.B.D. 149; nor is there a power given by statute for certain public reasons and for the advantage of the public to certain specified persons, such as in *Great Northern R.W. Co. v. Eastern Counties R.W. Co.* (1851), 9 Hare 306, and *London Brighton and South Coast R.W. Co. v. London and South Western R.W. Co.* (1859), 4 DeG. & J. 362. The workman is given a claim directly against the members of the board who are managing the business for whose advantage his work is given. The directors owe him a debt; and I am unable to understand why such a debt as this is not assignable, carrying to the assignee all the rights and remedies which the assignor previously had.

It is said that this statute is a penal statute, and must be interpreted strictly. The language of Maclellan, J.A., in *Welch v. Ellis*, 22 A.R. 255, at p. 262, is cited, in which that learned Judge says that this Act "imposes upon the directors a penal liability for the default of the company, though they may have been guilty of no wrong whatever." No doubt, from the point of view of the directors, the Act may be somewhat drastic—but what of the workman? The Legislature had to face this situation: when a company fails and does not pay its workmen, are the workmen, who had nothing to do with the management of the company, and could not know anything about the company's prosperity, to suffer, or are those who had all to do with the management, either directly or through the man they appointed, and who knew or ought to have known all about its financial condition?

The answer given by the Legislature is that the directors must bear some part of the loss at least—and, while that is "penal" as regards the directors, it is highly remedial as regards the workman. And, the director owing the workman the money, it can make no difference to him who sues, the workman or his assignee.

The appeal should be dismissed with costs.

FALCONBRIDGE, C.J.:—I agree in the result.

[DIVISIONAL COURT.]

McKINNON V. SPENCE.

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Jan. 4.

Dec. 9.

Will—Construction—Devise—Estates for Life and in Remainder—"Family"—Tenants in Common—Joint Tenants—Statute of Limitations—Legacies.

A testator, dying in 1855, by his will gave to his wife the sole use of his farm "to use as she may think proper until my son (J.) has arrived to the full age of twenty-one years. He is then to get the east of the farm and half of all the property on the farm at that time. They may then work the farm together or if my wife is tired of working the place J. is to have the management of the whole farm and is to support his mother during her widowhood and his four sisters until they are of age or married, at which time to each of the four girls are to get from the proceeds of my estate the sum of," etc. "The real estate to belong to the family as long as any of them are alive and to remain the property of my son's heirs." After J. became of age, in 1865, he undertook the management of the farm and supported his mother and sisters, who assisted in the work. Three of the four sisters married and left the farm. J. remained on the farm working it, and his unmarried sister also remained assisting in the work, until their mother's death in 1907:—*Held*, that the word "family" in the last clause of the will meant "children," and the five children of the testator took under the will a life estate as tenants in common, with a vested remainder to J. in fee under the rule in Shelley's case.

Held, also, that what was done by J. was consistent with the terms of the will; he was in possession as a tenant for life, under the will, and none the less so because he was permitted by his mother to act as manager during her lifetime; and the Statute of Limitations did not run in his favour as against any of his sisters while they remained in possession.

Hartley v. Maycock (1897), 28 O.R. 508, distinguished.

Held, also, that the proceeds of the farm, after providing for the support of the mother, belonged to the five tenants in common. But the possession of one tenant in common does not enure to the benefit of those who are out of possession; and the three married sisters, having remained out of possession for the statutory period, were barred by the Statute of Limitations.

The result was, that J. and his unmarried sister were entitled to a two-fifths interest in the whole farm as tenants in common, and were joint tenants of a three-fifths interest—the interest of the married sisters—with remainder to J. in fee.

Held, also, that the claims of the sisters to the legacies under the will were barred by the Statute of Limitations.

Judgment of FALCONBRIDGE, C.J.K.B., varied.

THIS action was brought by Christina McKinnon, Margaret Campbell, Sarah McLean, and Martha Spence, the daughters of Archibald Spence, deceased, against John Spence senior, John Spence junior, Duncan Spence, and Margaret Spence, the first of these being the only son of Archibald Spence, and the others being the children of the defendant John Spence senior, to obtain a declaration as to the interpretation of the will of Archibald Spence, and for other relief.

—Archibald Spence died on the 25th June, 1855, and by the will in question, made on the 2nd May, 1855, gave to his wife the

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sole use of his farm "to use as she may think proper until my son (John Spence) has arrived to the full age of twenty-one years. He is then to get the east of the farm and half of all the property on the farm at that time. They may then work the farm together or if my wife is tired of working the place John is to have the management of the whole farm and is to support his mother during her widowhood and his four sisters until they are of age or married, at which time to each of the four girls are to get from the proceeds of my estate the sum of ten pounds currency also bed and bedding with comfortable and decent wearing apparel and a good cow. The estate is to educate the family as far as consistent. The real estate to belong to the family as long as any of them are alive and to remain the property of my son's heirs." By a codicil, dated the 12th June, 1855, the testator gave and bequeathed to each of his daughters the additional sum of £15, being in all £25 currency.

Margaret Spence, the widow of the testator, resided upon the farm mentioned with the plaintiff and the defendant John Spence senior until the plaintiffs Christina McKinnon, Margaret Campbell, and Sarah McLean respectively married and removed therefrom, and thereafter the defendant John Spence senior and the widow and the plaintiff Martha Spence continued to reside thereon until the death of the widow on the 23rd December, 1907.

The plaintiffs Margaret Campbell and Sarah McLean were each paid out of the produce of the farm the sum of \$100, but the other two plaintiffs received nothing on account of their legacies.

The plaintiffs asked to have the will construed and their rights declared.

The defendant John Spence senior, by his statement of defence, alleged: (1) that, according to the true interpretation of the will, he became entitled in fee simple absolute to the east half of the farm; (2) that the widow of the testator elected not to work the farm with him upon his arriving at majority, and he then became entitled to a fee simple absolute in the whole farm, subject only to a charge thereon for the support of his mother during her widowhood, and to the support of each of his sisters until they arrived at the age of twenty-one years or married, and to the payment to each of them of the sum of \$100 on arriving at such age or marrying; (3) that after he arrived at the age of

twenty-one years he entered into possession of the whole of the farm, and had ever since been in actual undisturbed possession thereof, and was now in possession thereof; (4) that he duly supported and maintained the plaintiffs until they, other than the plaintiff Martha Spence, were married, and paid to the plaintiffs Margaret Campbell and Sarah McLean each \$100; (5) that the plaintiff Christina McKinnon never claimed or asked for payment of the \$100 given her by the will, and as to this he set up the Statute of Limitations; (6) that none of the plaintiffs nor the widow was ever in receipt of any part of the rents and profits of the farm; (7) that, although not bound to do so, he supported the plaintiff Martha Spence during her residence upon the farm long after she had attained twenty-one, and she never claimed the \$100 given her by the will, but he had more than paid that sum by her maintenance since she attained her majority, and he set up the Statute of Limitations as to her also; (8) that ever since the death of the testator it was understood among all the children of the testator, that he (the defendant John Spence senior) was solely entitled in fee simple absolute to the farm, in the events which happened, and that that understanding had been acted upon ever since 1865, when he entered into possession upon the faith thereof, and upon that understanding he expended large sums of money in working and building on and improving the farm; (9) that, if the plaintiffs ever had any estate, right, title, or interest in or to the farm or any part thereof under the will, he had ever since 1865 been in actual, peaceable, undisturbed, and exclusive possession of the same, without any acknowledgment of any title in the plaintiffs, and he pleaded the Statute of Limitations to any claim thereto; (10) that the plaintiffs had been guilty of laches.

The other defendants, the children of John Spence senior, disclaimed any interest in the farm, and asked to have the action dismissed as against them with costs.

To the statement of defence of the defendant John Spence senior the plaintiffs replied: (1) denying the allegations thereof; (2) denying that the defendant John Spence senior ever entered into possession of the whole of the farm or any part thereof as absolute owner; (3) denying that he had made any improvements at his own expense and for his own benefit, and saying that any improvements made were made upon the joint account and for

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the joint benefit and with the joint effort of all the plaintiffs and the defendant John Spence senior and their mother, Margaret Spence; (4) alleging that the Statute of Limitations did not commence to run until the death of Margaret Spence, and that the plaintiffs never were in a position to maintain an action for possession or for the stock and personal effect or for their legacies until the 23rd December, 1907.

The action was tried before FALCONBRIDGE, C.J.K.B., without a jury, at Lindsay, on the 7th December, 1908.

F. A. McDiarmid, for the plaintiffs.

E. D. Armour, K.C., and *A. J. Reid*, for the defendants.

January 4. FALCONBRIDGE, C.J.:—I am of the opinion that the Statutes of Limitation furnish a defence to all the plaintiffs' claims.

The defendant John Spence senior has been in possession for thirty years, not accounting for rents and profits. The widow and Martha were not on the land as claiming ownership but only as being supported under the will: *Hartley v. Maycock* (1897), 28 O.R. 508.

The defendants are entitled to have the action dismissed with costs.

At the trial the defendant John Spence senior, by counsel, expressed his willingness, notwithstanding the lapse of time, to pay the plaintiffs Christina McKinnon and Martha Spence their legacies of \$100 each, and this offer I direct him to carry out.

The plaintiffs appealed from the judgment of FALCONBRIDGE, C.J., and their appeal was heard by a Divisional Court composed of MULLOCK, C.J.Ex.D., MAGEE and CLUTE, JJ., on the 11th March, 1909.

E. E. A. DuVernet, K.C., and *F. A. McDiarmid*, for the plaintiffs.

E. D. Armour, K.C., for the defendant John Spence senior.

A. J. Reid, for the other defendants.

The arguments and authorities are sufficiently referred to below.

December 9. The judgment of the Court was delivered by CLUTE, J.:—The action is for construction of the will of Archibald Spence, the operative part of which is as follows:—(set out above).

The will is dated the 2nd day of May, 1855, and the testator died on the 25th June of the same year. At the time of his death the son was eleven years of age; the daughters were younger.

The Chief Justice of the King's Bench, before whom the case was tried, held that the defendant John Spence senior had been in possession of the farm for thirty years, not accounting for rents and profits; that the widow and Martha were not on the land as claiming ownership, but only as being supported under the will, citing *Hartley v. Maycock*, 28 O.R. 508; and dismissed the action with costs.

I have carefully read the examinations for discovery, which was the only evidence put in at the trial, and, from the examinations of the parties, I think it clear that the defendant John Spence senior was in, and held possession until his mother's death, under the will. After he became of age, he undertook the management of the farm and supported the family. Shortly after he was married, and at his mother's request, a double house was built, he and his wife occupying one portion and his mother and sisters occupying the other portion. Both families were supported from the proceeds of the farm.

The daughters, while at home, assisted in the out-door work of the farm, and Martha, the unmarried sister, continued to assist in the out-door work of the farm until the mother's death in 1907. All that was done by the son John in the way of managing the farm was quite consistent with the terms of the will, which provides that, if the wife became tired of working the place, John was to have the management of the whole farm. He was in possession as tenant for life, under the will, and none the less so because he was permitted to act as manager by his mother during her lifetime. I am, therefore, with great respect, of opinion that the Statute of Limitations would not run in his favour as against any of the children while they remained in possession. See *Foley v. Foley* (1879), 26 Gr. 463; *Bartels v. Bartels* (1877), 42 U.C.R. 22; *Re Defoe* (1882), 2 O.R. 623; *Houghton v. Bell* (1892), 23 S.C.R. 498; *Dalton v. Fitzgerald*, [1897] 2 Ch. 86; *Anstee v. Nelms* (1856), 1 H. & N. 225; and *Board v. Board* (1873), L.R. 9 Q.B. 48.

The case relied on by the learned trial Judge of *Hartley v. Maycock*, 28 O.R. 508, is distinguishable. There the widow entered as a trespasser, and it was held that the Statute of Limita-

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tions operated as to the enclosed part of the land. The nephew, who resided with her for two years, had no interest in the land, his father being then alive. He did not go upon the land in the assertion of a right or as owner of an interest to live upon it, but merely as a guest of his aunt, and in paying taxes he did so on her behalf and not as having any claim or interest for himself or any one else, and, therefore, it was held that it could not be said that the possession was not hers or that it was a possession by his license.

It is probable that the testator intended to give his son John the use of the east half of the lot. But the will does not say so. It says that the mother is to use the farm as she thinks proper until the son has arrived at the age of twenty-one years. He is then to get the east of the farm. I think this language too indefinite to convey an estate, but, in the view I take of the whole will, it is not very material, so far as John is concerned.

A clause providing for support and maintenance merely does not give an estate out of the land: *Gilchrist v. Ramsay* (1868), 27 U.C.R. 500. It does, however, amount to a charge: *Robson v. Jardine* (1875), 22 Gr. 420.

What interest then did the children take under the will? The last clause provides that "the real estate is to belong to the family as long as any of them are alive and to remain the property of my son's heirs." What is meant by the word "family"? In Stroud's Judicial Dictionary it is said that the primary legal meaning of "family" is "children," and reference is made to the judgment of Jessel, M.R., in *Pigg v. Clarke* (1876), 3 Ch. D. 672. There the question arose as between children and grandchildren, it being contended on the one hand that it meant "children," and on the other that it must include all the descendants of the testator. The Master of the Rolls said: "The word 'family' has various meanings. In one sense it means the whole household, including servants, and, perhaps, lodgers. In another sense it means everybody descended from a common stock, that is to say, all blood relations; and it may, perhaps, include the husbands and wives of such persons. In the sense I have just mentioned, the family of A. includes A. himself; A. must be a member of his own family. In a third sense, the word includes children only; thus when a man speaks of his wife and family, he means his wife and children.

Now, every word which has more than one meaning has a primary meaning; and if it has a primary meaning, you want a context to find another. What, then, is the primary meaning of 'family'? It is 'children;' that is clear upon the authorities which I have cited; and, independently of them, I should have come to the same conclusion."

The only case cited in support of that contention is *Barnes v. Patch* (1803), 8 Ves. 604. In this case the words were, "and the remainder of my estate to be equally divided between brother Lancelot's and sister Esther's families." It was held that by the word "family" children were meant.

In *Burt v. Hellyar* (1872), L.R. 14 Eq. 160, where the freehold was to "be equally divided between " the testator's "surviving children or their families," it was held that "families" meant children, and not descendants of the testator's children.

The word "family" may, however, be controlled by the context. In *Blackwell v. Bull* (1836), 1 Keen 176, Lord Langdale, M.R., said: "It is evident that the word 'family' is capable of so many applications that if any one particular construction were attributed to it in wills, the intention of testators would be more frequently defeated than carried into effect." And again: "In the case of a will we must endeavour to ascertain the meaning in which the testator employed the word, by considering the circumstances and situation in which he was placed, the object he had in view, and the context of the will." See Jarman, 5th ed., pp. 941-4.

Taking the meaning of the word "family" to be children, there is clearly a life estate as tenants in common given to them, and this life estate John takes with the rest, with a vested remainder in fee, under the rule in Shelley's case: Leith's Blackstone, 2nd ed., p. 276; *In re White and Hindle's Contract* (1877), 7 Ch. D. 201; and *In re Youmans' Will*, [1901] 1 Ch. 720; R.S.O. 1897, ch. 119, sec. 11.

After the sisters become of age or are married, the mother still living, where do the proceeds go? The sisters who are married or become of age are no longer entitled under the last clause to support. The mother is, of course, entitled to support. But to whom do the proceeds of the farm belong after providing for the support of the mother? In my opinion, to those who have the

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life interest, viz., to the five children. The fact that the farm might not be more than sufficient to provide for the support of the mother does not make any difference. Suppose, in the present case, the property, instead of yielding an income of a few hundred dollars, had yielded an income much larger than required for the support of the mother, could it be said that those to whom a life interest had been given, subject to the support, were not entitled to share in such surplus? I think not; and it therefore seems to me that all the five children who under the will received a life interest were entitled immediately to receive the same, if any surplus existed after the support of the mother had been provided for. That would be a matter of account, which could only be ascertained upon inquiry. But the right existed in each daughter, from the time she married or became of age, to have a declaration and to be paid the proceeds of the surplus. In short, the children were entitled to any surplus under the provision purporting to give it to the family for life. They would thus hold as tenants in common, subject to the mother's right to support. They are no longer entitled to support under the will, but they are entitled to the life interest, not *in futuro*, after the mother's death, but presently, subject to the mother's right of support. They are lawfully in possession and might remain there, and be entitled to their portion of any surplus. But the possession of one tenant in common does not enure to those who are out of possession: R.S.O. 1897, ch. 133, sec. 11.

In *Littledale v. Liverpool College*, [1900] 1 Ch. 19, 21, Lindley, M.R., laid it down that "in order to acquire by the Statute of Limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or *by having discontinued his possession of it.*"

"The effect of the expiration of the statutory period of limitation for actions to recover real property is not only to bar the right of action of the person against whom time is, but to extinguish his title altogether." Encyc. of the Laws of England, vol. 8, p. 318; R.S.O. 1897, ch. 133, sec. 15.

In *Dawkins v. Lord Penrhyn* (1877), 6 Ch. D. 318, 322, Jessel, M.R., referring to the corresponding section of the English statute, said: "Under the Statute of Limitations (3 & 4 Will. IV. ch. 27), as regards real property . . . the title itself is extinguished, and the right of action wholly disappears."

The Act having put an end to the doctrine of adverse possession, the only question is as to whether the time fixed by the statute has elapsed since the claimants' right accrued, whatever be the nature of the present holder's possession: *Darby & Bosanquet's Statute of Limitations*, 2nd ed., p. 275; *Nepean v. Doe d. Knight* (1837), 2 M. & W. 894, 911, 2 Sm. L.C., 9th ed., p. 628. The three sisters, having remained out of possession for the statutory period, are, in my opinion, barred by the statute.

In *In re Livingstone Estate* (1901), 2 O.L.R. 381, where, of five tenants in common of a farm, three acquired a title against the other two by virtue of the Statute of Limitations, it was held that the title acquired by the three tenants was a joint tenancy, and that they were thus tenants in common of their original three-fifths and joint tenants of the two-fifths. The reason for this is that R.S.O. 1897, ch. 119, sec. 11, has no application to a case of this kind, but refers only to lands granted, conveyed, or devised to two or more persons by letters patent, assurance, or will. See *Ward v. Ward* (1871), L.R. 6 Ch. 789.

The result is that the defendant John Spence senior and the plaintiff Martha Spence are entitled to a two-fifths interest in the whole farm as tenants in common, and are joint tenants of a three-fifths interest of the estate *pur autre vie* of the married sisters. John Spence senior is entitled to the remainder in fee.

I am further of opinion that any claim which the sisters had to the legacies given them by the will is barred by the Statute of Limitations, as the same was payable when they respectively arrived at the age of twenty-one years or were married, since which time more than the statutory period has elapsed.

A claim is made by the defendant John Spence senior for improvements. This was not pressed on the argument, and I am of opinion that there is not sufficient evidence upon which the Court can act. But, if there were such evidence, it is doubtful if any benefit would accrue to him if allowed. If any such improvements were made, the defendant John Spence senior and the plaintiff Martha Spence have had, and will have, the benefit of them, and, even if an allowance were made, there might be a claim for occupation rent, the trial of which would probably cost more than any benefit that would accrue: *Rice v. George* (1873),

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20 Gr. 221; *Curry v. Curry* (1898), 25 A.R. 267; *Gregory v. Connolly* (1850), 7 U.C.R. 500.

This claim for improvements is dismissed without prejudice to the defendant John Spence senior, if a claim is made against him for occupation rent.

The judgment of the Court below should be modified by declaring that, according to the true construction of the will, the children of the testator Archibald Spence took as tenants for life, with remainder to his son John Spence in fee; that the interests of the three married daughters—Christina, Margaret, and Sarah—are extinguished and their claims are barred by the Statute of Limitations; that John Spence senior and Martha Spence are entitled to a two-fifths interest in the said lands for life as tenants in common and a three-fifths interest for the lives of Christina, Margaret, and Sarah as joint tenants, with remainder to John Spence senior in fee; that the legacies given to the plaintiff by the will are barred by the Statute of Limitations; that the judgment of the Court below as to the payment of \$100 to Christina McKinnon and Martha Spence do stand; that the defendant John Spence do pay to the plaintiff Martha Spence a portion of her costs of this action, fixed at \$100; and, except as aforesaid, that there be no costs awarded here or below.

[DIVISIONAL COURT.]

RE MOORE AND TOWNSHIP OF MARCH.

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Appeal—County Court Judge—Audit of Engineer's Charges—Right of Appeal
—3 *Edw. VII. ch. 22, sec 4 (O.)*—9 *Edw. VII. ch. 46 (O.)*

Where a County Court Judge, acting under 3 *Edw. VII. ch. 22, sec. 4 (O.)*, audits the charges of an engineer or surveyor employed or appointed under the Municipal Drainage Act, there is no appeal, by virtue of 9 *Edw. VII. ch. 46 (O.)* or otherwise, from his allowance or disallowance of charges upon such audit; CLUTE, J., dissenting.

APPEAL by J. H. Moore from a certificate of the Judge of the County Court of Carleton, dated the 28th May, 1909, whereby he certified that he had disallowed \$896 of Moore's account against the corporation of the township of March for work performed by him as engineer under the provisions of the Municipal Drainage Act, R.S.O. 1897, ch. 226. The total amount of the account was \$3,189.74, and it was audited, in pursuance of sec. 4 of an Act to amend the Municipal Drainage Act, 3 *Edw. VII. ch. 22*, by the County Court Judge, who certified that, in his opinion, Moore was entitled to be paid \$2,293.74, and that he had disallowed charges to the amount of \$896 as being unreasonable. The County Court Judge gave reasons in writing for his finding, from which it appeared that the main ground for disallowing the charges in question was that the engineer had charged for the services of certain persons, to whom he had delegated parts of the work, a larger sum than he had actually paid these persons: see *Moore v. Township of March* (1909), 13 O.W.N. 692; *Re Moore v. Township of March* (1909), 1 O.W.N. 206.

Leave was given to Moore by the County Court Judge to appeal from his decision, and the appeal came on for hearing before a Divisional Court composed of MULOCK, C.J.Ex.D., CLUTE and RIDDELL, JJ., on the 29th September, 1909.

A. H. Armstrong, for the township corporation, objected that the Court had no jurisdiction to entertain the appeal, on the ground that the certificate of the County Court Judge was not appealable under the Judges' Orders Enforcement Act, 9 *Edw. VII. ch. 46 (O.)*, nor under any other Act or practice.

Featherston Aylesworth, for the appellant, contended that an

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appeal lay from the decision of the County Court Judge as *persona designata* under sec. 2 of 9 Edw. VII. ch. 46, special leave having been given, as provided by sec. 4.*

At the conclusion of the argument of this objection, judgment was given thereon, and an order pronounced quashing the appeal without costs; CLUTE, J., dissenting.

Written reasons were afterwards given as follow.

December 11. RIDDELL, J.:—By the Ontario statute of 1903, 3 Edw. VII. ch. 22, sec. 4, it is provided that any engineer or surveyor employed or appointed under the Municipal Drainage Act shall send in his account; that the account upon request is to be audited by the County Judge free of charge; and that “the County Judge shall audit the account and may disallow any charges which he may deem unreasonable . . . and the amount disallowed shall not be recoverable by the engineer or surveyor.”

The appellant was appointed by the township of March, and sent in his account, which was audited by the County Judge of Carleton; he disallowed a very large part of the account, proceeding, as I think, upon a wrong principle. I may say that, had I been auditing this account, the amounts disallowed would have been of a trifling character.

The learned County Court Judge gave special leave to appeal; and an appeal was brought on before the Divisional Court under the provisions of the Act of 1909, 9 Edw. VII. ch. 46, secs. 2, 4.

Objection was taken that an appeal does not lie under this or any other Act or practice. It is admitted that, unless the proceeding can be brought within the Act of 1909, the appeal cannot be heard.

I think the objection is a valid one.

The Judge is, no doubt, given here jurisdiction as *persona designata*, but the method in which this jurisdiction is to be exercised is prescribed: (1) the bill is to be filed with the clerk, with all requisite details; (2) the clerk is to deliver the account to the County Judge; (3) the County Judge is to appoint a time and place at which he will proceed with the audit; (4) the clerk is to give at least two days' notice of the audit to the engineer and the

* The provisions of the Act are set out in the judgment of CLUTE, J.

head of the municipality; (5) at the time and place fixed the County Judge shall audit the account, being given the power to disallow any charges which he may deem unreasonable (not which are unreasonable in fact or in the opinion of some other Judge or tribunal); and (6) he shall certify to the amount to which, in his opinion (not the opinion of some one else), the surveyor is entitled.

The statute does not, in my opinion, apply; it is not a case in which "jurisdiction is given to a Judge as *persona designata*, and no other mode of exercising it is prescribed."

Much as I regret the result, it is, in my view, inevitable—the Legislature has in effect determined that an engineer or surveyor employed under the Act is to be paid not what his services are worth, but what the County Judge thinks they are worth.

The appeal must be quashed.

MULOCK, C.J.:—I agree.

CLUTE, J.:—A preliminary objection was taken, that an appeal does not lie from the audit made by a County Judge under 3 Edw. VII. ch. 22, sec. 4. That Act provides that the account of the engineer and surveyor employed under the Municipal Drainage Act shall, upon request of the municipal council, be audited by the County Judge.

I express no opinion as to the sum disallowed, but deal exclusively with the preliminary objection.

Under 9 Edw. VII. ch. 46, being an Act respecting the Enforcement of Judges' Orders in matters not in Court, it is provided that where jurisdiction is given to a Judge as *persona designata*, and no other mode of exercising it is prescribed, he shall have jurisdiction as a Judge of the Court to which he belongs, and the same jurisdiction for enforcing his orders, as to proceedings generally, as to costs and otherwise, as in matters under his ordinary jurisdiction as a Judge of such Court. Section 3, sub-sec. 1, provides for filing the order; sub-sec. 2 declares that upon an order being so filed it shall become an order of the Court, and may be enforced in the same manner and by the like process as if the order had been made by such Court. Sub-section 4 provides that the order shall be entered in the same manner as a judgment of the Court in which the order is so filed. Section 4 provides that there shall

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be no appeal from such order unless an appeal is expressly authorised by the statute giving the jurisdiction or unless special leave is granted by the Judge making the order or by a Judge of the High Court, in which case the appeal shall be to a Divisional Court of the High Court whose decision shall be final.

This is an enabling statute, and should receive a liberal construction. It expressly applies to the enforcing of Judges' orders in matters not in Court, and provides for cases where jurisdiction is given to a Judge as *persona designata*, and no other mode of exercising it is prescribed.

Here it is clear that under sec. 4 of ch. 22, 3 Edw. VII., above quoted, the County Judge is *persona designata*, and there is no other mode of exercising his duty as auditor except that given by the Act to him as County Judge. The action of the Judge who makes the audit is in effect to order that the claimant shall not be entitled to recover the amount which he disallows, and he is directed to certify the amount to which, in his opinion, the engineer is entitled, and the amount disallowed shall not be recoverable by the engineer. His certificate is binding upon the parties, and is in effect an order.

It is clear to my mind that the intention of the Legislature was that in such a case there should be an appeal. In short, that the Act was passed expressly to cover cases of this kind. It could never have been intended, I think, that jurisdiction should have been given to the County Judge to deal with a claim not within the jurisdiction of the County Court, and that he should have power to finally deprive the claimant of a large portion of his claim, without the claimant having the opportunity or right to have the matter litigated, and without appeal.

In my opinion, this Court has jurisdiction to hear the appeal. The majority of the Court taking the view that an appeal does not lie, it is not necessary for me to deal with the merits of the appeal.

[DIVISIONAL COURT.]

JONES V. TORONTO AND YORK RADIAL R.W. CO.

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Street Railways—Injury to Person Crossing Track—Negligence—Excessive Speed—Failure to Give Warning—Neglect of Motorman—Failure of Person Injured to Look for Approaching Car—Evidence for Jury.

The plaintiff, who was somewhat hard of hearing, attempted to cross from the east to the west side of a highway on which the defendants' single track was laid. Before he began to cross he observed a car of the defendants standing upon a siding about 550 feet north of him, and, from his knowledge of the practice of the defendants, inferred that it was waiting there for a car from the south to pass it. He, therefore, just before crossing the track, looked south for a car, but did not look north, and had almost passed over the track when he was struck by a car coming from the north, and injured. There was evidence that the gong was not sounded nor the whistle blown nor the speed of the car slackened as he approached the track. He could have seen the car approaching had he turned and looked, and the motorman must have seen him approaching the track. Had the brakes been applied and the car delayed for a second or two, he would have escaped. There was evidence that it was going at from 16 to 18 miles an hour:—

Held, that there was some evidence of negligence on the part of the motorman which should have been submitted to the jury; and a nonsuit was set aside.

Per MULOCK, C.J.Ex.D., that the plaintiff was not to assume that the motorman would start his car from a point enabling him to see the plaintiff walking in a direction that would soon bring him upon the track, and, nevertheless, that the car would be driven at such a speed as to overtake him, and that without giving any warning of its approach.

Per CLUTE, J., that there was evidence to submit to the jury of negligence on the part of the motorman in not sounding the gong, in not exercising more care in keeping a look-out, and in not applying the brakes before the car struck the plaintiff. He could not but see that the plaintiff was approaching the track, and it was to be inferred from the evidence that he ought to have known that the plaintiff was oblivious of the approaching car.

Brill v. Toronto R.W. Co. (1909), 13 O.W.R. 114, distinguished.

Judgment of MACMAHON, J., reversed.

MOTION by the plaintiff to set aside a nonsuit entered by MACMAHON, J., at the trial, and for a new trial.

The following statement of the facts is taken from the judgment of CLUTE, J.:—

This action is brought for damages for injuries received by the plaintiff owing, as he alleges, to the negligence of the defendants, whereby he was run over by their car while crossing the public highway and seriously injured. The accident occurred in Yonge street, south of Eglinton avenue. There is a village along Yonge street with houses on both sides of the road. The railway track is on the west side of the road. The plaintiff was going north,

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and, desiring to see a person upon the west side of the road, he stopped his horse and waggon upon the east side. In getting out of the waggon, he saw that a car was standing about 550 ft. north, upon a siding, where, as the evidence shews, cars are in the habit of passing each other going north and south. The plaintiff then started to cross the track. There is evidence that the house across the track to which he was going was about 50 ft. further south than where his horse stood. He would, therefore, be going in a south-westerly direction. The plaintiff was somewhat hard of hearing. There is evidence that the gong did not sound, nor the whistle blow, nor was the speed slackened as he approached the track. He could have seen the car approaching had he turned and looked, and the motorman could and must have seen him approaching the track as the car came on towards him. He had passed between the rails and was almost over the track. A moment more and he would have been clear. Had the brakes been applied and the car delayed for a second or two, there is evidence that he would have escaped.

The learned trial Judge held that the plaintiff was the author of his own injury, and directed the action to be dismissed, at the close of the plaintiff's case.

The appeal was heard on the 17th November, 1909, by a Divisional Court composed of MULOCK, C.J.Ex.D., CLUTE and SUTHERLAND, JJ.

John MacGregor, for the plaintiff. There was no contributory negligence on the part of the plaintiff. To cross in front of an approaching train is one thing; to cross in front of a tram-car is quite another: *Toronto R.W. Co. v. King*, [1908] A.C. 260, at p. 269; *Dublin Wicklow and Wexford R.W. Co. v. Slattery* (1878), 3 App. Cas. 1155. It was not incumbent on the plaintiff to look again to see if the car was coming, he reasonably assuming that it would remain on the siding: *Tinsley v. Toronto R.W. Co.* (1908), 17 O.L.R. 74; *Forwood v. City of Toronto* (1892), 22 O.R. 351, and cases cited in the judgment at p. 355; *Ewing v. Toronto R.W. Co.* (1894), 24 O.R. 694, at p. 699; *Toronto R.W. Co. v. Gosnell* (1895), 24 S.C.R. 582; *Hegan v. Eighth Avenue R.R. Co.* (1857), 15 N.Y. 380; *Haight v. Hamilton Street R.W. Co.* (1898), 29 O.R. 279; *Vallée v. Grand Trunk R.W. Co.* (1901), 1 O.L.R. 224. The

neglect to give warning is for the jury; the motorman must be on the look-out: *Davies v. Mann* (1842), 10 M. & W. 546, at p. 549; *Morrow v. Canadian Pacific R.W. Co.* (1894), 21 A.R. 149; *Daldry v. Toronto R.W. Co.* (1905), 6 O.W.R. 62. The gong should have been sounded, but was not: *Toronto R.W. Co. v. Mulvaney* (1907), 38 S.C.R. 327; *Green v. Toronto R.W. Co.* (1895), 26 O.R. 319. The speed was excessive: *Halifax Electric Tramway Co. v. Inglis* (1900), 30 S.C.R. 256. The case should not have been withdrawn from the jury: *Sims v. Grand Trunk R.W. Co.* (1906), 12 O.L.R. 39. Reference also to *Hamilton Street R.W. Co. v. Moran* (1895), 24 S.C.R. 717.

C. A. Moss, for the defendants. The cases cited on behalf of the plaintiff govern only such facts as are disclosed in each particular case, and the facts of this case are different. The plaintiff was guilty of contributory negligence, and so the case was properly withdrawn from the jury: *Danger v. London Street R.W. Co.* (1899), 30 O.R. 493; *Fewings v. Grand Trunk R.W. Co.* (1909), 1 O.W.N. 1, 14 O.W.R. 586. The plaintiff should have looked back before attempting to cross the track: *O'Hearn v. Town of Port Arthur* (1902), 4 O.L.R. 209; *Small v. Toronto R.W. Co.* (1905), 6 O.W.R. 97. The motorman did not know that the plaintiff intended to cross the track.

December 11. CLUTE, J. (after setting out the facts as above):— This application is for a new trial upon the ground that there was evidence to go to the jury of negligence on the part of the defendants in travelling at too high a rate of speed; in not keeping a proper look-out and not having the car under control; in not giving warning to the plaintiff when the motorman must have seen him approaching the track; and in not applying the brakes so as to permit him to get clear of the track before the car struck him.

It is said by two of the witnesses (the plaintiff's sons) that the car was going at from 16 to 18 miles an hour.

The question is, whether, under the circumstances of this case, the nonsuit was right.

"All foot passengers, including aged persons, women and children, have an equal right to cross the streets; and all drivers of teams and carriages are bound to respect their rights and regulate their own speed and movements in such a manner as not to violate the rights of such passengers:" Shaw, C.J., in *Common-*

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wealth v. Temple (1859), 14 Gray (Mass.) 69, 75. This passage is quoted with approval by Boyd, C., in *Haight v. Hamilton Street R.W. Co.*, 29 O.R. 279, 281, who points out that "this was adhered to as the true principle in one of the latest cases in a Court perhaps of highest authority in any of the American States: *Driscoll v. West End Street R.R.* (1893), 159 Mass. 142, 146."

"In cases of this sort, where the public use of a street is concerned, we are to be careful not to fetter the public right by rules of law as to what specifically constitutes reasonable care or the want of it:" *per* King, J., in *Toronto R.W. Co. v. Gosnell*, 24 S.C.R. 582, 587, 588. In that case it was held that the driver of a cart was "not guilty of contributory negligence because he did not look to see if a car was approaching if, in fact, it was far enough away to enable him to cross if it had been proceeding moderately and prudently. He can be in no worse position than if he had looked and seen that there was time to cross."

"It is not unreasonable for the private traveller to assume that the car will be driven moderately and prudently. He can calculate distance and the time required to effect his own change of position in order to prevent injury in such cases:" *Hegan v. Eighth Avenue R.R. Co.*, 15 N.Y. 380, cited with approval in the *Gosnell* case.

Whether the plaintiff exercised reasonable care is for the jury: *Vallée v. Grand Trunk R.W. Co.*, 1 O.L.R. 224. Although the plaintiff might be guilty of some negligence in approaching the track, it is still for the jury to say whether the defendants might not, by the exercise of reasonable care, still have avoided the accident: *Toronto R.W. Co. v. Mulvaney*, 38 S.C.R. 327. See *Wright v. Grand Trunk R.W. Co.* (1906), 12 O.L.R. 114; *Misener v. Wabash R.W. Co.* (1906), 12 O.L.R. 71, affirmed in *Wabash R.R. Co. v. Misener* (1906), 38 S.C.R. 94; *Peart v. Grand Trunk R.W. Co.* (P.C., 1886), now reported in 10 O.L.R. 753 (Appx.).

In the last three cases there was a breach of a statutory duty. In the present case it does not appear that there was a breach of a statutory duty, but, if a duty arises by reason of the circumstance of the case, and that duty is not discharged, by reason of which the plaintiff is injured, I can see no reason why the same general rule as to care should not be applied. Of course if it appears from admission or otherwise that the person injured was the author of his own injury, different considerations obtain.

The case of *Brill v. Toronto R.W. Co.* (1909), 13 O.W.R. 114, turned upon the question of excessive speed, which was held to be not established. Garrow, J.A., who pronounced the judgment of the Court, does say, however (p. 117), that if he had not been able to reach that conclusion (that there was no evidence of excessive speed) he would still have had some difficulty in supporting a judgment in favour of the plaintiffs, for, in his opinion, the proper conclusion upon the evidence was that the accident was caused by the plaintiff Sarah Brill's own imprudence in passing from behind the north-bound car and going upon the westerly track without looking to see where the car was which she had seen standing above Queen street. The appeal was not, however, decided upon this point, and, so far as I have been able to find, there is no authority directly in point. Each case must be decided upon its own facts and circumstances. Applying, however, the general principles laid down in the above cases to the present case, I cannot say that there was no evidence to submit to the jury of negligence on the part of the motorman in not sounding the gong, and exercising more care in keeping a look-out, and applying the brakes before the car struck the plaintiff. He could not but see that the plaintiff was approaching the track, and it may be inferred from the evidence that he ought to have known that the plaintiff was oblivious of the approaching car. The facts in this case distinguish it, I think, from the *Brill* case. There the motorman could not see the plaintiff till she was on the track and his car practically upon her, and, there being no evidence in the view of the appellate Court of excessive speed, of course the case failed.

Upon the whole, I am of opinion that the case ought not to have been withdrawn from the jury. The judgment below should be set aside and a new trial had between the parties. As the defendants' counsel expressly took his chances of the result, the plaintiff is entitled to the costs of the first trial and of this appeal, to be paid on taxation.

MULOCK, C.J.:—The facts of this case are very fully set forth in the judgment of my brother Clute, which I have had the advantage of reading, and I agree with his views and have little to add.

The question involved is one of fact, namely, whether the plaintiff was negligent and whether his negligence was the cause of the accident. The situation prior to the accident was that

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the plaintiff was sitting in his waggon in Yonge street, distant some 30 or 35 feet from the defendants' track, which was to the plaintiff's west. The plaintiff was looking north, and he there saw a car standing upon a siding at a point about 200 yards away. He then descended from his waggon, and crossed Yonge street, intending to cross the track. He did not again look northerly to see whether the car was coming towards him, but stepped upon the track and was injured. His explanation for not looking northerly is that he was familiar with the defendants' practice in using the siding for the purpose of enabling cars to pass each other, and he assumed that the car was standing still for the purpose of allowing a car from the south to pass it.

It does not appear why he anticipated a car coming from the south rather than from the north to pass the standing car; but, nevertheless, his evidence shews that he had some knowledge of the defendants' practice in respect of this siding, and from that knowledge assumed that the car waiting on the siding was to allow another from the south to pass it at that point. Accordingly, when about to cross the track, apprehending danger from the south only, his attention was wholly turned in that direction. From his standpoint it was his duty to look to the south. Was he negligent in not looking also to the north? What would a man of ordinary prudence have done under the circumstances? The motorman of the car had a clear view of the track. Was the plaintiff to assume that the motorman would start his car from a point enabling him to see the plaintiff walking in a direction that would soon bring him upon the track, and, nevertheless, that the car would be driven at such a speed as to overtake him, and that without giving any warning of its approach by gong or whistle?

The question admits of but one answer, and, if a jury were to find, as a matter of fact, that, under the circumstances, the plaintiff was justified in drawing the inference that he could have safely crossed the track, it could not be said, I think, that there was no evidence to support such a finding.

For these reasons and also for those so fully set forth in the judgment of my brother Clute, I think the plaintiff is entitled to a new trial, and to payment of the costs of the former trial and of this appeal.

LATCHFORD, J.:—I agree.

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Landlord and Tenant—Assignment by Tenant for Benefit of Creditors—Rent in Arrear—"Preferential Lien"—R.S.O. 1897, ch. 170, sec. 34 (1)—Destruction by Fire of Goods Subject to Distress—Lien on Insurance Moneys in Hands of Assignee.

Two days after an assignment to the defendant by M. for the benefit of his creditors, under the Assignments and Preferences Act, the goods in the possession of the assignee upon premises demised by the plaintiff to M. were destroyed by fire. The goods were insured by M., and the policies had been assigned to the defendant. At the date of the assignment M. was indebted to the plaintiff for rent in the sum of \$626.38, \$300 of which had accrued due within one year prior to the date of the assignment (R.S.O. 1897, ch. 170, sec. 34 (1)). From the goods destroyed the plaintiff could, by distress, at or before the date of the assignment, have made the whole of the rent due:—

Held, that the plaintiff was not entitled to a "preferential lien"—the expression used in sec. 34 (1)—upon the insurance moneys paid to the defendant in respect of the goods destroyed.

In re McCracken (1879), 4 A.R. 486, and *Lazier v. Henderson* (1898), 29 O.R. 673, distinguished.

Chew v. Traders Bank of Canada (1909), 19 O.L.R. 74, specially referred to. Judgment of BOYD, C., reversed.

CASE stated by the parties.

The following statements of the facts is taken from the judgment of MULLOCK, C.J.Ex.D.:—

The question involved in this action, which comes before the Court as a stated case, is whether the plaintiff, being a creditor of Samuel E. Mitchell for \$300, the amount of rent owing by him for one year immediately preceding his assignment for the benefit of his creditors, is entitled to a preferential lien therefor on moneys in the assignee's hands.

The facts as stated for the opinion of the Court are as follows:—

On the 2nd November, 1908, one Samuel E. Mitchell made an assignment to the defendant, under the Act respecting Assignments and Preferences by Insolvent Persons, to the defendant. At the date of this assignment the insolvent was tenant of certain premises of the plaintiff, and was indebted to him for rent thereof in the sum of \$626.38, a part of which sum, namely, \$300, was rent in respect of the demised premises which had accrued due within one year prior to the execution of the assignment.

On the 2nd November, 1908, the defendant, as such assignee, entered into possession of the demised premises, and on the 4th

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November, 1908, the premises and contents, consisting of a stock of goods, wares, and merchandise, were destroyed by fire.

At the time of the execution of the assignment, and also at the time when the defendant entered into possession of the premises, there were in the same sufficient goods and chattels, the property of the tenant Mitchell, liable for rent, out of which the plaintiff could, by distress, have made the said sum of \$626.38, owing for rent. At the time of the execution of the assignment the said goods and chattels of the tenant Mitchell, in said premises occupied by him as such tenant, were insured against loss by fire, and the policies of insurance were duly assigned by Mitchell to the defendant, who collected the insurance moneys payable under such policies, amounting to \$6,450, which sum he now holds as assignee.

The claim of the plaintiff is that he is entitled to rank as a preference creditor for \$300, being the rent for one year immediately prior to the assignment.

The stated case was heard by BOYD, C., in the Weekly Court, on the 10th June, 1909.

C. A. Moss, for the plaintiff.

M. H. Ludwig, for the defendant.

June 11. BOYD, C.:—"Preferential lien" in the statute* signifies that the landlord is entitled to be paid out of the proceeds of the goods on the premises, which but for the assignment would have been liable to distress to the extent of one year's arrears. By virtue of the assignment under which possession is taken, the goods are to be accounted as *in custodiâ legis*, upon which or upon the proceeds whereof the landlord has a statutory lien to that extent. This is the result of the law as expounded in *In re McCracken* (1879), 4 A.R. 486, and *Lazier v. Henderson* (1898), 29 O.R. 673, cited on the argument.

Goods available for distress were taken possession of by the assignee, and the proceeds of those goods, which were consumed

* The Landlord and Tenant's Act, R.S.O. 1897, ch. 170, sec. 34 (1): "In case of an assignment for the general benefit of creditors the preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of one year last previous to, and for three months following, the execution of such assignment and from thence so long as the assignee shall retain possession of the premises leased."

by fire, are represented by the insurance money in the hands of the assignee. He holds this fund as assets to be distributed among all creditors, but, before making distribution, he must first provide for the payment of the "preferential lien" of the landlord. That is clearly the only equitable view, and its propriety has been recognised in an analogous case cited of *Chew v. Caswell* (1909), 13 O.W.R. 548, decided by my brother Riddell.* The proceeds of the goods may be ear-marked by the actual sale of them or by the conversion of them by fire into the insurance money which stands in their stead.

This view, expressed at the close of the argument, I now adhere to, and so answer the stated case.

Though the expression used in the case cited of *Neale v. Reid* (1823), 3 D. & R. 158, 162 (S.C., 1 B. & C. 657), be more appropriate—"that the money paid upon the policy was not a part of the proceeds of the goods; it was a substitute for those proceeds"—still the proceeds came to the hands of the assignee as assets to be distributed, and subject to the prior claim of the landlord.

The defendant appealed from the judgment of the Chancellor, and the appeal was heard on the 20th October, 1909, by a Divisional Court composed of MULLOCK, C.J.Ex.D., MACLAREN, J.A., and CLUTE, J.

M. H. Ludwig, for the defendant. The landlord (the plaintiff) has not the right to rank as a preferred creditor. Goods of an assignor in the hands of an assignee under an assignment made pursuant to the Assignments and Preferences Act, R.S.O. 1897, ch. 147, are not *in custodia legis*: *Langley v. Meir* (1898), 25 A.R. 372. The right of the landlord to distrain has not been taken away by the Act: *Linton v. Imperial Hotel Co.* (1889), 16 A.R. 337, at p. 341. The Landlord and Tenant's Act, R.S.O. 1897, ch. 170, sec. 34, does not give the landlord a preferential lien. It only restricts the common law lien to one year prior to the assignment. An assignee must pay the landlord out of the proceeds of goods which are subject to distress at the time of the assignment, but insurance moneys are not the proceeds of goods. Insurance moneys are an

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* The judgment of Riddell, J., was reversed by the Court of Appeal on the 30th June, 1909. See *Chew v. Traders Bank of Canada* (1909), 19 O.L.R. 74, referred to by Clute, J., *post*.

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indemnity. A mere lien on property insured does not give the holder of the lien a corresponding claim upon the policy which the owner of the goods has obtained for the protection of his own interest therein, although the assured is personally liable to pay the debt, which is a lien upon the property insured. A mortgagee has a lien, but cannot get the insurance moneys unless they are payable to the mortgagee: Bunyon's Law of Insurance, 5th ed., p. 389; *Carr v. Fire Assurance Association* (1887), 14 O.R. 487, 490; *Watt v. Gore District Mutual Insurance Co.* (1861), 8 Gr. 523, 527. As to the position of landlord and tenant see Bunyon's Law of Insurance, pp. 395, 400; *Lazier v. Henderson*, 29 O.R. 673, 678. A mortgagee has no more title than any other creditor: *Columbia Insurance Co. of Alexandria v. Lawrence* (1836), 10 Peters (U.S.) 507, 511. As to risks which cannot be insured, see Porter's Laws of Insurance, 5th ed., pp. 252, 484. Rent may be specifically insured: Bunyon's Law of Insurance, p. 54. So the landlord had an insurable interest and could have protected himself. There is no equity in favour of a landlord; his right is purely statutory.

Featherston Aylesworth, for the plaintiff. A trust is created by an assignment for the benefit of creditors. The landlord had a right to distrain at the time of the assignment. This right remained to him after the assignment, but it would have been improper for the landlord then to distrain. The assignee is trustee for both the ordinary and preferred creditors as such respectively. The fire does not change the nature of his trust: *Lazier v. Henderson*, *supra*; *Langley v. Meir*, *supra*. It is the assignee's duty to insure, if there is no insurance, for the benefit of all creditors, not for any one class only: Bicknell & Kappel's Practical Statutes, p. 467.

December 11. MULOCK, C.J. (after setting out the facts as above):—The view of the learned Chancellor appears to have been that, by virtue of the assignment, the goods are to be considered as *in custodia legis*; that, by virtue of the statute, the landlord remained entitled to a preferential lien thereon or upon their proceeds; and that the insurance money in the assignee's hands represented the goods, and that the landlord's preferential lien attached to this fund.

With all respect, I find myself unable to accept the learned

Chancellor's conclusion. Nor, in my opinion, are the rights of the parties affected by the circumstance that the moneys in the assignee's hands are the proceeds of the insurance of the insolvent's goods, upon which the landlord had a lien for rent.

Fire insurance is a mere personal contract, whereby the assurer agrees to indemnify the other party against pecuniary loss, in the event of his property being destroyed or injured by fire. In the case of realty, it is not a contract which runs with the land; nor, in the case of personalty, does it, if I may use the expression, run with the chattels.

The purchaser of a chattel insured by the former owner for his own benefit, not having by contract obtained any legal or equitable interest in the contract of insurance, has no claim upon the assurers in case of destruction of the chattel by fire. Their contract was merely to indemnify the former owner against loss in the event of his property being destroyed. So in the case of realty, as stated by Bunyon in his *Law of Fire Insurance*, 5th ed., p. 389: "It is well settled that, in the absence of any contract between them, neither mortgagor nor mortgagee has any interest in any fire insurance policy effected by the other of them with *his own* funds and for his own security."

In *Lees v. Whiteley* (1866), L.R. 2 Eq. 143, which was the case of a mortgage of certain machinery, the mortgage deed containing a covenant to insure, but no provision for the application of the insurance moneys in case of fire in liquidation of the mortgage debt, the machinery was burnt, and the defendants became bankrupt, and it was held that, notwithstanding the covenant to insure, the mortgagor not having by contract given to the mortgagee any right to the insurance money, the latter had no claim to the benefit of the policy as against the mortgagor. To have held otherwise would have been to make a new contract between the parties.

In *Columbia Insurance Co. of Alexandria v. Lawrence*, 10 Peters (U.S.) 507, at p. 511, Mr. Justice Story says: "Now, we know of no principle of law or of equity, by which a mortgagee has a right to claim the benefit of a policy underwritten for the mortgagor on the mortgaged property, in case of a loss by fire. It is not attached, or an incident, to his mortgage. It is strictly a personal contract for the benefit of the mortgagor, to which the mortgagee has no

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more title than any other creditor. Lord Chancellor King in *Lynch v. Dalzell* (1729), 4 Bro. P.C. 431, *S.C.*, 2 Marshall on Insurance, B. 4, ch. 4, p. 803, took notice of this distinction, saying, 'These policies are not insurances of the specific things (goods) mentioned to be insured; nor do such insurances attach to the realty, or in any manner go with the same, as incident, by any conveyance or assignment: but they are only special agreements with the persons insured against such loss or damage as they may sustain.' "

Thus a mortgagee, apart from contract, has no interest in a policy of insurance effected by the mortgagor, nor in the moneys payable to the mortgagor in the event of destruction of the mortgaged premises by fire.

The rule is also the same in the case of a landlord in respect of his lien for rent. As stated by Bunyon, *supra*, at p. 400: "By analogy to the preceding rules we may assume that if, after a distraint for rent, and before sale, a fire occurs, a landlord has no lien upon the insurance of his lessee."

Applying these views to this case, it seems to me that the fact that the moneys in the assignee's hands are the proceeds of the insurance effected by the tenant upon the chattels which had been distrainable by the landlord, at least up to the time of the assignment, gives to the landlord no right to a lien thereon, and that the question involved in this appeal is whether, irrespective of the source from which the assignee in fact derived the funds in question, the landlord is, under the other circumstances of the case, entitled to a preferential lien thereon.

It was argued that the effect of the assignment was to place the estate of the insolvent *in custodia legis*, and, as in the case of an estate in the hands of a receiver, to deprive the landlord of his right to distrain, and *In re McCracken*, 4 A.R. 486, is relied on in support of this proposition. That case, however, can have no application here, as it turned largely upon the effect of sec. 125 of the Insolvent Act of 1875, which enacts that "all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, hypothec, lien or right of property upon, in or to any effects or property in the hands, possession or custody of an assignee, may be obtained by an order of the Judge . . . and not by any suit, attachment, opposition, seizure or other proceeding of

any kind whatever." This section was in *In re McCracken* interpreted as prohibiting the landlord from levying a distress upon the goods of the insolvent after they had come into the possession of the assignee, and, in lieu of such remedy, as entitling him to have his lien made effective by an order of the Court. In such case the estate was in the custody of the law to be administered with due regard to all claims for debts, privileges, hypothecs, liens, etc.

But the Act under which the debtor here made the assignment contains no such provision. It neither ties the hands of the landlord by preventing him from distraining after assignment, nor does it entitle him to have his lien realised through the machinery of the Court, instead of by distress. As said by Osler, J.A., in *Linton v. Imperial Hotel Co.*, 16 A.R. 337, at p. 346: "Nor am I aware of any authority for saying that property on the demised premises in the possession of such assignee is *in custodia legis* so as to be protected from distress, that being a right which has not been expressly taken away."

I am therefore of opinion that the goods upon which the plaintiff might have levied did not, upon the assignment, pass *in custodia legis*.

The remaining point for consideration is whether, the plaintiff not having distrained, and the goods having ceased to exist, he has a preferential lien within the meaning of sub-sec. 1 of sec. 34 of the Landlord and Tenant's Act. That sub-section reads as follows: "In case of an assignment for the general benefit of creditors the preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of one year last previous to, and for three months following, the execution of such assignment and from thence so long as the assignee shall retain possession of the premises leased."

The meaning of the words "preferential lien" has been commented upon in various cases. In *Mason v. Hamilton* (1872), 22 C.P. 190, which was the case of a landlord's claim for preferential payment of rent out of the estate in the hands of the assignee, Gwynne, J., dealing historically with the origin of the words "preferential lien," interpreted them as meaning that, where a landlord had a lien for rent upon chattels which were also bound by a writ of execution, or had, subject to the lien, passed to an assignee, the landlord's lien, to the extent provided in the statute,

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should be preferred to the claim of the execution creditor or the assignee.

In this same case in appeal (22 C.P. 411, 413) Draper, C.J., also discussed the meaning of the words "preferential lien" as follows: "If the latter word is construed according to our law, it means a right to keep possession of the goods of another until a claim or claims of the holder of the goods against that other are satisfied. It therefore implies an actual possession; not a mere right to take possession, nor yet a right to all the goods in order to satisfy such claims. It is not easy to understand such a term in relation to a landlord to whom rent for one or more years is due. Until distress levied he has no actual right in the tenant's goods; he must distrain to acquire one; and having distrained (unless there be a replevin within five days, or payment) he acquires a right to sell. And the word 'preferential,' however suitable to the case . . . provided for in 27 & 28 Vict. ch. 17, sec. 8, sub-sec. 4, is not accurately employed in reference to the landlord's remedy for overdue rent, by distress. These words being in their ordinary and legal acceptance inapplicable to the apparent object of the enactment, we must endeavour to ascertain the sense in which they have been used, from the statute itself, and especially from the section into which they are introduced."

Spragge, C., in the same case, at p. 416, discussing the meaning of the words "preferential lien," says: "In *Hammonds v. Barclay* (1801), 2 East 227, 235, Mr. Justice Grose, in delivering the judgment of the Court, defined a lien to be 'a right in one man to retain that which is in his possession, belonging to another, until certain demands of him, the person in possession, are satisfied.' The prefix 'preferential' is a word hardly necessary, perhaps, to describe the quality of the lien; but it is appropriate as descriptive of its quality, in that it is to be preferred to the general claim of others in respect of the same thing, viz., the goods of the debtor. Taking Mr. Justice Grose's definition in its terms, it applies strictly to the case of a landlord who has already made a distress, inasmuch as until distress made the possession is not in the landlord, but in the tenant. To apply this to sec. 81 of the Act of 1869, the preferential lien of the landlord for rent—that lien arising upon distress for rent levied—is restricted to the arrears for one

year before assignment. But, assuming that the words 'preferential lien' have a wider significance, and mean the right to have possession by distress as well as consummation of that right by the actual levying of a distress, still the latter, the more accurate technical meaning of the word, cannot be excluded. All that can be said is, that the term is wide enough to include both."

Dealing with these observations of the Court, Moss, C.J.A., in *Re McCracken*, 4 A.R. at p. 492, says: "It appears to me that a creditor may, without any inaccuracy of expression, be said to have a lien upon goods, when he has a right to receive his debt out of their proceeds, or to prevent a disposition being made of them without payment of his claim. Full effect would thus be given to the words 'preferential lien,' by holding the landlord entitled to be paid by the assignee out of the proceeds of the goods on the premises, which, but for the assignment or attachment, would have been liable to distress, and making the year's or six months' rent a charge upon the proceeds in priority to the claims of other creditors, or rather making the surplus only an asset of the estate available for distribution among other creditors."

It appears to me that the intention of the sub-section under consideration was merely to limit the amount of rent in respect of which the landlord should retain his lien, and not to enlarge his right by entitling him to resort to property not distrainable by him. Where, as in *In re McCracken*, *supra*, the estate passed into the hands of an assignee, and the landlord was prohibited from realising by distress, his right to be paid by the assignee the amount to which his claim was limited, was not an unqualified one entitling him to payment out of the moneys of the estate generally, but only the right to payment out of proceeds of the distrainable goods come, or which ought to have come, to the assignee's hands.

Were it otherwise, a landlord might be in a better position after than before assignment. For example, the value of the goods subject to his lien might be less than the amount of his preferential lien, but if, on the assignment by the tenant, the landlord were to be entitled to be paid the amount of his preferential lien out of the estate generally, he would thus have a lien not only on the proceeds of the goods theretofore distrainable by him, but on the moneys realised from other sources. The language of the

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statute is not, I think, open to such construction. It does not make his claim for rent a charge upon a fund upon which it was not a charge previous to the assignment.

The sub-section, in my opinion, makes no change in the law except to the extent of cutting down the landlord's common law right to a lien from six years' to one year's rent and rent subsequent to the assignment. In other respects the rights of parties are not affected by the sub-section. It would thus follow that the only funds in the assignee's hands being the insurance moneys, which are not the proceeds of the tenant's goods subject to the landlord's lien, there is no fund to which the lien applies, and, therefore, the landlord is not entitled to any priority, but must, in respect of his debt, rank ratably with the other unsecured creditors.

This appeal should, therefore, be allowed with costs.

CLUTE, J.:—The contest is between the plaintiff, as landlord, and the defendant, as assignee under the Assignments Act, R.S.O. 1897, ch. 147, in respect of a claim by the landlord of \$300 for rent, which had accrued due one year prior to the execution of the assignment. The assignment was made on the 2nd November, 1908, and on the same day the defendant, as assignee, entered into possession of the premises, and on the 4th November, 1908, the said premises and contents, consisting of a stock of goods, wares, and merchandise, were totally destroyed by fire. On the date of the assignment there were, on the said premises so let by the plaintiff to the defendant, sufficient goods and chattels, the property of the tenant Mitchell, liable to distress for rent, out of which the plaintiff could have, by distress, made the whole of the said rent, amounting to \$626.38. The said goods and chattels were insured by Mitchell, and the said policies were duly assigned by Mitchell to the defendant as assignee, and the entire sum now in the hands of the defendant as such assignee is \$6,450, all of which moneys were paid by the insurance companies under the said insurance policies.

The plaintiff claims that he is entitled to rank on the moneys now in the hands of the defendant, as such assignee, as a creditor for \$626.38, and to rank as a preference creditor for \$300, being the rent for one year immediately prior to the date of the said assignment.

The defendant admits the claim of the plaintiff for \$626.38 as an ordinary creditor, but denies that the plaintiff is entitled to rank upon said moneys as a preferred creditor; and the question submitted on the stated case is as to the right of the plaintiff as a preferred creditor to payment of the sum of \$300 out of the above mentioned moneys received by the defendant from the insurance companies, upon the facts above set out.

The learned Chancellor held that "by virtue of the assignment under which possession is taken, the goods are to be accounted as *in custodia legis*, upon which or upon the proceeds whereof the landlord has a statutory lien to that extent. This is the result of the law as expounded in *In re McCracken*, 4 A.R. 486, and *Lazier v. Henderson*, 29 O.R. 673, cited on the argument. Goods available for distress were taken possession of by the assignee, and the proceeds of those goods, which were consumed by fire, are represented by the insurance money in the hands of the assignee. He holds this fund as assets to be distributed among all creditors, but, before making distribution, he must first provide for the payment of the 'preferential lien' of the landlord. That is clearly the only equitable view, and its propriety has been recognized in an analogous case cited of *Chew v. Caswell*, 13 O.W.R. 548, decided by my brother Riddell. The proceeds of the goods may be earmarked by the actual sale of them or by the conversion of them by fire into the insurance money which stands in their stead."

Reference was also made to *Neale v. Reid*, 3 D. & R. 158, 162 (S.C.; 1 B. & C. 657), where it is said "that the money paid upon the policy was not a part of the proceeds of the goods; it was a substitute for those proceeds."

In *In re McCracken*, 4 A.R. 486, upon the insolvency of the lessee, the assignee sold the insolvent's property, including the goods upon the demised premises, without paying the rent due thereon, and it was held that the landlord was entitled to an order for immediate payment of the arrears. There was no question in that case of the goods having been destroyed by fire after the assignment. So also in *Lazier v. Henderson*, 29 O.R. 673, where the landlord claimed against the assignee a preferential lien for rent, there was no question of insurance, as in this case. In both cases it is said in effect that the landlord is entitled to the money, being the proceeds of the goods of the insolvent which

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he might have distrained. Although there was no actual distress, does the same rule apply in respect of moneys received on policies of insurance taken in the name of the tenant and duly assigned, where there is no covenant to insure on the part of the lessee?

"It is well settled that, in the absence of any contract between them, neither mortgagor nor mortgagee has any interest in any fire insurance policy effected by the other of them with *his own* funds and for his own security:" Bunyon's Law of Fire Insurance, 5th ed., p. 389.

If, however, a mortgagor covenants that he will insure in his own name, and that the proceeds of the policy shall be applied for the benefit of the mortgagee, any policy effected by the mortgagor will be held to have been so in compliance with or execution of the covenant: *Nichols and Co. v. Scottish Union, etc., Insurance Co.* (1885), 2 Times L.R. 190; Bunyon, 5th ed., p. 395. It is said in Bunyon, at p. 400, that "by analogy to the preceding rules we may assume that if, after a distraint for rent, and before sale, a fire occurs, the landlord has no lien upon the insurance of his lessee."

R.S.O. 1897, ch. 170, sec. 34 (1), provides that "in case of an assignment for the general benefit of creditors the preferential lien of the landlord for rent shall be restricted to the arrears of rent during the period of one year last previous to, and for three months following, the execution of such assignment."

It is said by Street, J., in *Lazier v. Henderson*, 29 O.R. at p. 678, that the expression "the preferential lien of the landlord for rent" is borrowed from the Insolvent Acts of 1869 and 1875, and received a judicial construction in *In re McCracken*, 4 A.R. 486. It was there held that, although by our law a landlord has no lien upon his tenant's goods until distrained, yet because the right to distrain was taken away by these Acts, while at the same time a so-called preferential lien for his rent was preserved to the landlord, he was entitled, without making any distraint, to require the assignee to pay him, out of the proceeds of the goods upon which he might—but for the Act—have distrained, the amount for which the statute assumed him to have a lien, and it was there held that the landlord has a statutory lien, independent of either

distress or possession, for rent, as limited by the 34th section, upon the goods subject to distress at the time of the assignment.

The same principle would seem to apply to a case of this kind as that between mortgagor and mortgagee. An insurance is a contract for indemnity, not to substitute something in the place of the articles destroyed by fire, but to indemnify the assured against such loss. It is difficult to see how the landlord can have a higher right in respect of insurance money under a policy effected by his tenant, than a mortgagee has against his mortgagor, where there is no covenant to insure. The case is very clearly put by Mr. Justice Story in *Columbia Insurance Co. of Alexandria v. Lawrence*, 10 Peters (U.S.) 507, 511. He says: "We know of no principle of law or of equity, by which a mortgagee has a right to claim the benefit of a policy underwritten for the mortgagor on the mortgaged property, in case of a loss by fire. It is not attached, or an incident, to his mortgage. It is strictly a personal contract for the benefit of the mortgagor, to which the mortgagee has no more title than any other creditor."

It was strongly urged by Mr. Aylesworth that a trust in favour of the landlord is created by the statute, and that the insurance moneys received by the assignee were affected by some trust in favour of the landlord. Something very analogous to this question was discussed in *Chew v. Traders Bank of Canada*, 19 O.L.R. 74. The Traders Bank advanced to C. & Co. money to carry on their lumbering operations. C. & Co. insured this lumber, making the loss payable to the bank; and, while lying in the plaintiff's yard, the lumber was destroyed by fire. The plaintiff had a lien upon this lumber for sawing, and claimed to be entitled to payment out of the insurance moneys in priority to the bank. Riddell, J., at the trial, held that he was so entitled, and that a lien existed in favour of the plaintiff. He then proceeds (p. 76): "But it is contended by the bank that the destruction of the goods destroyed the lien, and that the bank may, consequently, hold the whole amount of the insurance money as against the plaintiff. . . . On principle, I do not think the position of the bank can be maintained. The insurance was upon the lumber, and covered the interests of all who had an insurable interest, at the least. . . . Had the insurance money been payable directly to the lumbermen, I think it not doubtful that they would have had it in their

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'hands bound by a trust in favour of the' plaintiff 'to the extent of' his 'interest in the subject matter of the insurance:' *Imperial Bank of Canada v. Hinnegan* (1905), 5 O.W.R. 247, at p. 249. And I am unable to see that the circumstance that the money is made payable to the bank makes any difference." The judgment of Riddell, J., was reversed by the Court of Appeal. Garrow, J.A., who delivered the judgment of the Court, referring to the above view of the case stated by Riddell, J., says: "I am, with deference, quite unable to agree with this conclusion. I even doubt whether upon the facts the plaintiff could have successfully asserted a right to a lien upon the insurance money if the bank had been out of the question altogether. . . . It is not enough to say, as in effect was said, that now that the lumber is burnt, the insurance money represents it, and because it represents the lumber and because the plaintiff had an insurable interest in respect of his lien, therefore he had the same lien on the insurance money that he had on the lumber." He points out that in the case of *Imperial Bank of Canada v. Hinnegan*, the learned Chief Justice says, at p. 248: "The agreement of Raymond to insure for the benefit of the defendants was also, I think, proved;" and proceeds: "A very material finding, without which the result in that case would not have been arrived at. There is here no evidence of any contract, express or implied, between the plaintiff and Caswell & Co. upon the subject of insurance, nor anything to shew that the subject was ever mentioned between them prior to the fire."

As far as this language goes, it strongly supports the view that, the insurance having been effected by the tenant, and there being no covenant on the part of the tenant to insure in favour of the landlord, the lien of the landlord was given when the property upon which it existed was destroyed by fire, and he had no right, by covenant or otherwise, to claim any part of the insurance moneys from a policy which was effected for the sole benefit of the tenant, and remained therefore in the hands of the assignee for the benefit of creditors generally.

The judgment in appeal in the *Chew* case was not given until after the Chancellor's decision in this case.

If, as would seem to be the law, a mortgagee has no claim upon insurance moneys arising under a policy effected by the mortgagor, where there is no covenant to insure and no provision that the

insurance moneys, in case of loss, should be paid to the mortgagee, I can see no reason in principle why a landlord's lien in this assignment should have a higher right. He had an insurable interest. He did not see fit to insure. The policy of insurance held by his tenant was strictly a part of his estate. There was no lien or charge as against that. When it passed to the assignee, it passed for the benefit of creditors, as a distinct asset of the estate, and independent of the goods which it covered, and I can see neither the legal nor the equitable right in the landlord to claim insurance moneys in the hands of the assignee.

With much deference, I think the appeal should be allowed, and that it should be declared that the plaintiff is not entitled as a preferred creditor to payment of the sum of \$300 out of the insurance moneys in the hands of the defendant. The defendant is entitled to the costs below and of this appeal.

MACLAREN, J.A., concurred.

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[IN THE COURT OF APPEAL.]

REX v. KARN.

Criminal Law—Permitting Young Girls to be on Premises for Purposes of Fornication—Criminal Code, sec. 217—"Unlawfully."

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The defendant invited or induced or knowingly suffered two girls, under the age of eighteen, to be upon his premises for the purpose of being, as they were, carnally known by him and another:—

Held, that he was properly found guilty of an indictable offence under sec. 217 of the Criminal Code.

The word "unlawfully," in the expression "unlawfully and carnally known," in sec. 217, does not import that the unlawful carnal connection must be something of a character elsewhere declared to be unlawful and penalised by the Code or by some other definite law or the general law of the land; the word is used, in describing the act penalised, in the sense of not sanctioned or permitted by law, and as distinguished from acts of sexual intercourse which are not regarded as immoral.

CASE reserved by the police magistrate for the city of Toronto.

The following statement of facts is taken from the judgment of OSLER, J.A.:—

The defendant was convicted of an offence under sec. 217 of the Criminal Code, which is taken from the corresponding section

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(6) of the Imperial Criminal Law Amendment Act of 1885 (48 & 49 Vict. ch. 69).

The question stated by the magistrate is, "Does the evidence in this case, on which I believe the evidence of the Crown witnesses, disclose and prove the commission by the defendant, as a matter of law, of the offence intended by sec. 217 of the Criminal Code?"

The section enacts that "every one who, being the owner or occupier of any premises, or having, or acting or assisting in, the management or control thereof, induces or knowingly suffers any girl under the age of eighteen years to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally, is guilty of an indictable offence, and is liable" to the punishment prescribed.

The defendant was the owner or occupier of his business premises in Queen street, Toronto, and there is ample evidence that the two young women who gave evidence on the prosecution, and who were both over fourteen and under eighteen years of age, were brought by the defendant to his shop above referred to, and were there kept or invited to remain by him, and did so remain until he had carnal connection with one of them and his clerk carnal connection with the other of them. One of them went to the same place a second time, and there again had carnal connection with the defendant, who paid her therefor on each occasion. The evidence of the girls was sufficiently corroborated as required by sec. 1002 of the Code.

The case was argued before MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 1st December, 1909.

T. C. Robinette, K.C., and *Eric N. Armour*, for the defendant. The main question for decision in this case is as to the meaning of the phrase "unlawfully and carnally known" in sec. 217 of the Criminal Code. It is submitted that the "unlawful" carnal knowledge there referred to is not such carnal knowledge as offends against the moral law, but such as is declared to be unlawful by the Code itself or by the common law, as, for example, incest (sec. 204), seduction under the circumstances specified in secs. 211-213, carnal knowledge of idiots (sec. 219), or of girls under

fourteen (sec. 301). The object of sec. 217 is to prevent the facilitating of such intercourse as is "unlawful" within the meaning of this definition. Adultery is not an offence at common law, though it may be so by the ecclesiastical law of England, which is not in force here. They referred to *The King v. Brindley* (1903), 6 Can. Crim. Cas. 196; *The Queen v. Webster* (1885), 16 Q.B.D. 134, 15 Cox C.C. 775; Archbold's Criminal Pleading and Evidence, 23rd ed., p. 913; Russell on Crimes, 6th ed., vol. 3, p. 223.

J. R. Cartwright, K.C., and *E. Bayly*, K.C., for the Crown. The evidence clearly proves the commission of an offence under sec. 217 of the Code, which is similar in all respects to the corresponding section of the English statute 48 & 49 Vict. ch. 69, except as to the limitation of age. *The Queen v. Webster* is, therefore, entirely in point, and is conclusive against the defendant's contention.

December 14. OSLER, J.A. (after stating the facts as above):— I do not understand why this case, so far as any point taken before the magistrate is concerned, should have been reserved, as it seems to be a very clear one.

The evidence brings the case within the very words of the section. The defendant invited or induced or knowingly suffered these girls to be upon his premises for the purpose of being, as they in fact were, unlawfully and carnally known by him and another. What more is required to bring him within the danger of the enactment?

In *The Queen v. Webster*, 16 Q.B.D. 134, 15 Cox 775, a mother was convicted under the English Act of knowingly suffering her daughter to be upon premises for the purpose in the section specified, though these were the premises in which the mother and daughter lived together, having no other home. The present case is *â fortiori*. The section is wide enough—"to resort to or be in or upon such premises"—to cover the case as well of a continued practice as of a single instance, as in the English case just cited, where it was unsuccessfully argued that the section was aimed at cases where a person who occupies premises keeps girls on the premises or suffers them to resort to the premises for the purpose of prostitution.

Some point was attempted to be made upon the word "unlaw-

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fully;" and it was urged that the unlawful carnal connection which the section proscribes must be something of a character elsewhere declared to be unlawful and penalised by the Code or by some other definite law or the general law of the land, but I do not think so. If there were anything in the point, it was open in the case above cited, and was not likely to have been overlooked.

If the contention were sound, it would simply make the section of no effect.

In Cowan v. Milbourn (1867), L.R. 2 Ex. 230, 236, it was said by Bramwell, B.: "It is strange that there should be so much difficulty in making it understood that a thing may be unlawful, in the sense that the law will not aid it, and yet that the law will not immediately punish it. If that only were unlawful to which a penalty is attached, the consequence would be that, inasmuch as no penalty is provided by the law for prostitution, a contract having prostitution for its object would be valid in a court of law."

Section 217 is one of a group of sections which now do deal with and penalise in the specified instances certain acts hitherto only unlawful in the sense that they were breaches of the moral law.

Section 211 deals with illicit intercourse with a girl of previously chaste character; sec. 212, with illicit intercourse under promise of marriage with a female under twenty-one of previously chaste character; 213, with the case of (a) a guardian who has illicit connection with his ward, (b) illicit connection with a girl under twenty-one of previously chaste character employed by the seducer in his factory, etc.; 214, with illicit intercourse by the master, etc., of a vessel with female passengers; 216, with procuring a girl under twenty-one, not a common prostitute, to have unlawful carnal connection with any other person, and with enticing such girl to a house of ill-fame for the purpose of illicit intercourse or prostitution; 219, with having unlawful carnal connection with a female idiot or deaf or dumb woman or girl.

In these sections the words "unlawful" and "illicit" appear to me to be synonymous and to be used, in describing the act penalised, in the sense of not sanctioned or permitted by law and as distinguished from acts of sexual intercourse which are not

regarded as immoral. See the Oxford and the Century Dictionaries, *sub verb.* "illicit" and "unlawful."

I refer also to *The Queen v. Clarence* (1888), 22 Q.B.D. 23.

On the whole, I have no doubt that the question must be answered in the affirmative, and that the conviction must be affirmed.

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MACLAREN, J.A.:—Section 217 of the Criminal Code, under which the accused was convicted, is copied from sec. 6 of the Imperial Criminal Law Amendment Act, 1885. The case of *The Queen v. Webster*, 16 Q.B.D. 134, 15 Cox C.C. 775, in which a conviction was upheld by Lord Coleridge, C.J., and Denman, Field, Hawkins, and Wills, JJ., is on all fours with the present. Mr. Robinette, however, raises a point that was not argued in that case, viz., that the statute only makes it an offence where the carnal knowledge or fornication is unlawful. He argues that "unlawful" here means something that is prohibited and punishable by law, and not merely something that is contrary to the moral law, and that, the immoral act in this case not being so prohibited or punishable, the accused did not violate the law by inducing or suffering the girl to be upon his premises for that purpose.

The word "unlawful" or "unlawfully" is not defined in the Code, and an examination of the various sections in which it appears shews that it is not always used in the same sense. The context and the evil aimed at will generally throw light upon the sense in which it is used in each particular case.

It is frequently used as synonymous with "illicit" or as being simply "not lawful" or "not authorised or permitted by law." Such meanings are given to it as usual ones in the leading dictionaries. Inasmuch as any issue from such intercourse as took place in this instance would undoubtedly be "unlawful," it would not appear to be improper to apply the word to the act itself. This definition is sanctioned by judicial authority in the United States Circuit Court in *MacDaniel v. United States* (1898), 87 Fed. R. 324, at p. 326. In *Cowan v. Milbourn*, L.R. 2 Ex. 230, at p. 236, Bramwell, B., says: "It is strange that there should be so much difficulty in making it understood that a thing may be unlawful, in the sense that the law will not aid it, and yet that the law will

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not immediately punish it. If that only were unlawful to which a penalty is attached, the consequence would be that, inasmuch as no penalty is provided by the law for prostitution, a contract having prostitution for its object would be valid in a court of law." See also the observation of Wills, J., in *The Queen v. Clarence*, 22 Q.B.D. 23, at p. 36.

There are also other instances in which it is an offence to use premises for a certain purpose where the particular acts done therein are not themselves punishable by law, as in the case of betting houses, gaming houses, etc.

I am clearly of opinion that the question reserved should be answered in the affirmative.

MEREDITH, J.A.:—The accused was prosecuted under the provisions of sec. 217 of the Criminal Code, which is in these words (set out above): and the one point now made in his behalf is, that the word "unlawfully" means something criminally unlawful, and that, as the carnal knowledge, in respect of which the accusation was made, was not criminally unlawful, he could not rightly be convicted; and that single point, no doubt, comprises the only question intended to be reserved, though the question is so loosely and widely expressed that it might include several other points, some of which, being questions of fact, it would be incompetent to ask, as well as to answer, upon a reserved case.

The word "unlawfully," of course, comprises things criminal in character; but it also comprises many things not lawless in a criminal sense; and the question is whether it is, in this enactment, used in its broader or narrower sense; and it is, of course, a point in the accused's favour that the enactment in which it is used is an Act relating exclusively to crime and procedure in criminal matters; but, on the other hand, in its general use, it has the wider signification, and is very commonly used in reference to the offspring of illicit sexual intercourse: see *Johnson v. State of Ohio* (1902), 66 Ohio St. 59; *MacDaniel v. United States*, 87 Fed. R. 324; and *State v. Dorsey* (1888), 118 Ind. 167.

Fornication, under any circumstances, is unlawful, in the one sense, but, in the circumstances of this case, it was not criminally unlawful, though under other circumstances it is also criminally unlawful, as expressed in several sections of the Criminal Code.

In my opinion, it is not a necessary ingredient, in the crime with which the accused was charged, that the carnal knowledge should be criminal in its character; it is enough if it be unlawful; and that it was unlawful in that sense is obvious; if the accused were suing to recover money for the use of his "premises" for the purposes to which he permitted them to be put, he would fail because of the unlawful character of the transaction; if the woman sued for an agreed price of her prostitution, she would fail in like manner; if there were issue of the connection, it would be unlawful; indeed, everything connected with and issuing out of the gross immorality, would be unlawful.

Then the enactment in question, and several other sections of a like general character, were taken from the Imperial enactment 48 & 49 Vict. ch. 69, intituled in part "An Act . . . for the Protection of Women and Girls . . .," in which the words "unlawful" and "unlawfully" are frequently employed, and evidently, I think, used in their wider sense. Section 5, for instance, makes it a misdemeanour, punishable with not more than two years' imprisonment, with or without hard labour, to unlawfully and carnally know, or attempt to have unlawful carnal knowledge of, any girl of, or over, the age of thirteen, and under sixteen; and sec. 4 makes it a felony to unlawfully and carnally know any girl under thirteen; and sec. 2 makes it a misdemeanour to procure, or attempt to procure, any girl or woman under twenty-one, not being a common prostitute, or of known immoral character, to have unlawful carnal connection with any other person.

In those sections of the Imperial enactment which have been carried into the Criminal Code, these same words have been employed; but, where a change has been made respecting any of the same offences, different words have been used. For instance, instead of sec. 5, the Criminal Code—sec. 212—provides that every one is guilty of an indictable offence, and liable to two years' imprisonment, who seduces or has illicit connection with any girl of previously chaste character of or above the age of fourteen and under twenty-one; and, instead of sec. 4, the provision of the Criminal Code—sec. 301—is that every one is guilty of an indictable offence, and liable to imprisonment for life and to be whipped, who carnally knows any girl under the age of fourteen, not being his wife; but this difference in wording does not, as it seems to

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me, materially affect the meaning of the two enactments in respect of the point in question, because I do not understand how any carnal knowledge, such as that dealt with in the several enactments, could be lawful, except of a lawful wife by her lawful husband. If the words "unlawful" and "unlawfully" were left out of the enactments, the cohabitation of lawful man and wife would be a crime, as much as cohabitation which was adultery or fornication.

Cases can, no doubt, be imagined in which anything like two years' imprisonment would be grossly harsh; but two years is, when the girl is not under fourteen years of age, the maximum; there is power to impose a fine only: sec. 1035.

The cases, too, seem to me directly against the accused. The only one referred to upon the argument here—*The Queen v. Webster*, 16 Q.B.D. 134—was one respecting a girl under sixteen years of age, and so one of a girl coming within the provisions of sec. 5 of the Imperial enactment, but, as that section made the sexual intercourse criminal only if "unlawful," there could have been no conviction in that case unless the wider meaning were given to that word; and no one seems to have suggested that there could be no conviction because "unlawful" meant criminally unlawful. In the case of *The Queen v. Tyrrell*, [1894] 1 Q.B. 710, 712, Coleridge, C.J., referring to the Imperial enactment, said: "With the object of protecting women and girls against themselves, the Act of Parliament has made illicit connection with a girl under sixteen unlawful; if a man wants to have such illicit connection he must wait until the girl is sixteen, otherwise he breaks the law."

The case of *The Queen v. Clarence*, 22 Q.B.D. 23, though generally very instructive, is not very helpful here; it was under a different enactment, and the sexual intercourse was between husband and wife. The general opinion seems to have been that it was "unlawful" because it would have been a ground for relief in the divorce Court.

Mr. Armour's contention is, that the words "unlawful carnal knowledge," in the section in question, mean only such carnal knowledge as is, by other sections of the Criminal Code, made a crime; but that seems to me to require altogether too narrow a view of the section; and in many cases would, no doubt, be quite

unnecessary, a superfluous provision, as the wrong-doer might be prosecuted as a party to the offence, under sec. 69 of the Criminal Code.

The main purpose of the section is, in my opinion, the protection of all girls under eighteen years of age from opportunities for prostitution.

The conviction should, upon this point, be confirmed; I would answer the question in accordance with the views I have expressed

Moss, C.J.O., and GARROW, J.A., concurred.

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[IN THE COURT OF APPEAL.]

REX V. CORRIGAN.

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Criminal Law—Magistrate's Conviction under Repealed Statute—Attempt to Sustain under Different Statute.

The defendant was prosecuted before a police magistrate for a breach of the provisions of sec. 415 of the Railway Act of Canada, R.S.C. 1906, ch. 37, and on the evidence was found guilty of the offence as charged. No amendment was asked for, and a conviction was recorded on the charge as laid. Subsequently the magistrate discovered that sec. 415 had been repealed, and he thereupon, by virtue of 8 & 9 Edw. VII. ch. 9, sec. 2 (schedule), amending sec. 1014 of the Criminal Code, reserved for the opinion of the Court of Appeal the question whether the conviction should be allowed to stand under sec. 283 of the Criminal Code:—

Held, that the conviction could not be sustained under a different statute.

CASE reserved by David M. Brodie, police magistrate for the district of Sudbury, under sec. 1014 Criminal Code.

The following statement of the facts is taken from the judgment of OSLER, J.A.:—

The defendant was prosecuted for a breach of the provisions of sec. 415 of the Railway Act of Canada, R.S.C. 1906, ch. 37,* which

*The information was "for that the said J. J. Corrigan on Monday the 31st day of May, 1909, being then a servant of the Canadian Pacific Railway Company, at the village of White River, there and then employed by the said company, to wit, engineer, did unlawfully and negligently violate a certain by-law, rule, or regulation of the said company, lawfully made and then in force, a copy of the said by-law, rule, or regulation having been delivered to him, and by negligently violating the said by-law, rule, or regulation, thereby causing by such violation injury to person and property, contrary to the provisions of R.S.C. 1906, ch. 37, sec. 415, and subsequent amendments thereto."

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enacts that every officer or servant of any company who wilfully or negligently violates any by-law, rule, or regulation of the company, lawfully made and in force, of which a copy has been delivered to him, if such violation causes injury *to any person or property*, or though no actual injury occurs, exposes any person or property to the risk of such injury, etc., is guilty of an offence and shall in the discretion of the Court before which the conviction is had be punished by fine or imprisonment or both.

On the evidence the defendant was found guilty of the offence as charged. No amendment was asked for, and the conviction was recorded on the charge as laid. Subsequently it was brought to the magistrate's attention that the section under which the defendant had been prosecuted and convicted had been repealed, and the magistrate thereupon reserved for the opinion of this Court the following, among other questions:—

"3. The conviction having been made under sec. 415 of the Railway Act, which is repealed, should the conviction be allowed to stand under sec. 283 of the Criminal Code, and is it necessary, under sec. 283 of the Code, that a neglect of duty should be wilful?"

That section enacts that every one is guilty of an indictable offence, and liable to two years' imprisonment, who by any unlawful act or by any wilful omission or neglect of duty endangers or causes to be endangered the safety *of any person conveyed or being in or upon a railway* or aids or assists therein.

The case came on for hearing before MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 1st December, 1909.

J. R. Cartwright, K.C., for the Crown, admitted that the conviction was bad, and declined to argue the case further.

A. J. Thomson, for the prisoner, contended that in any case the evidence did not support the conviction, either under sec. 415 of the Railway Act or sec. 283 of the Code.

December 14. OSLER, J.A.:—It appears to me that when the representative of the Crown, in the exercise of his judgment and discretion, declines to support a conviction, on its face open to such an objection as exists in the present case, this Court ought not to be required to search for reasons to support it. Judgment, however, having been reserved, the question must be answered.

In its present form the conviction is of course bad, the information having been laid, the charge prosecuted, and the conviction recorded, under a section of the Railway Act which had been repealed. And it cannot be upheld under sec. 283 of the Criminal Code, because the offence therein mentioned is of a different nature from that mentioned in sec. 415 of the Railway Act. One is an indictable offence to be prosecuted by indictment—R.S.C. 1906, ch. 1, sec. 28—for endangering the safety of any person conveyed or being in or upon a railway: the other was an offence punishable on summary conviction—R.S.C. ch. 1, sec. 28—under part XVI. of the Code, for causing or exposing to risk of injury to person or property. For the one the limit of the term of imprisonment is two years, for the other it was five. For the one, which is finable in addition to or in lieu of imprisonment under sec. 1035 of the Code, no limit seems to be imposed in respect of the fine: secs. 1028, 1029. For the other the fine was limited—sec. 415 (2)—to \$400.

Then, also, the prosecution having expressly proceeded and the magistrate having expressly convicted under the repealed clause, there is nothing by which to uphold the conviction under a different statute. The case of *Michell v. Brown* (1858), 1 E. & E. 267, seems in point. There the conviction took place under a statute which was held to have been repealed, and, for the reason just mentioned, it was held that it could not be supported under a later statute. Much of what Lord Campbell, C.J., said, in delivering the judgment of the Court, applies: "If a later statute again describes an offence created by a former statute, and affixes a different punishment to it, varying the procedure, etc., giving an appeal where there was no appeal before, we think that the prosecutor must proceed for the offence under the later statute. If the later statute expressly altered the quality of the offence, as by making it a misdemeanour instead of a felony or a felony instead of a misdemeanour, the offence could not be proceeded for under the earlier statute: and the same consequence seems to follow from altering the procedure and the punishment. The later enactment operates by way of substitution, and not cumulatively giving an option to the prosecutor or the magistrate."

Had the charge been laid generally, or merely *contra formam statuti*, a different conclusion might have been arrived at: *Rex v. Garland* (1909), 26 Times L.R. 130.

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The first part of the third question in the case reserved must, therefore, be answered in the negative, with the result that the conviction must be quashed. It is unnecessary to answer the other questions.

MEREDITH, J. A.:—This case comes here under the provisions of a recent amendment to the Criminal Code,* which has the effect of greatly increasing the number of criminal cases which may be reserved for consideration in this Court; and of correspondingly relieving the Crown, and the Minister of Justice, from dealing with such cases, on an application for the mercy of the Crown.

The accused was tried and convicted on the 12th June last, but this case was not reserved until the 8th November following: some, if not all, of the questions reserved having, apparently, not suggested themselves to any one connected with the trial until long after the conviction.

The charge against the accused was, under the provisions of one of the sections of the Railway Act—sec. 415—of an unlawful and negligent violation of a by-law of a railway company, and of that only. That section, however, unknown to any one connected with the trial, had been repealed before the accident, out of which the charge arose, happened: 7 & 8 Edw. VII. ch. 18, sec. 15.

In these circumstances, the conviction cannot be sustained under a different enactment, even if the facts proved might also have brought the case within its provisions: there was no conviction, no trial, no accusation, under this enactment.

The accused should, in my opinion, be discharged; that is, discharged from the accusation and conviction of having violated the provisions of the by-law.

I may add that the first question reserved is, in my opinion, a question of fact, and therefore one which there was no power to reserve; and the second one is of no consequence, now that the enactment to which it is directed is repealed.† If this question

* By 8 & 9 Edw. VII. ch. 9, sec. 2 (schedule), sec. 1014 of the Criminal Code, R.S.C. 1906, ch. 146, is amended by repealing sub-sec. 3 and substituting: "3. Either the prosecutor or the accused may, during *or after* the trial . . . apply to the Court to reserve any such question as aforesaid.

† The questions were: (1) Was I right in holding that the switch at the west end of the siding was at the front end of the train and under the protection of the engineer? (2) Had I jurisdiction to try this case with the consent of the accused?

had been whether there was power to convict summarily, without such consent, it would have provided some difficulties: see sec. 431 of the Railway Act. It would be extraordinary if such power were conferred, carrying with it power to imprison for four years.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

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[IN THE COURT OF APPEAL.]

REX V. STEFFOFF.

Criminal Law—Evidence—Statements of Prisoner Charged with Murder to Person in Authority—Admissibility—Negating Threats or Inducements—Warning—Sufficiency.

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The prisoner, a foreigner charged with murder, was placed under arrest and taken to the police station, where the policeman in charge instructed an interpreter to tell the prisoner that, in view of any charge that might be brought against him, he need not answer anything unless he liked, but anything he said would be used in evidence against him. This was all that the policeman told the interpreter to say to the prisoner, and the interpreter told the prisoner exactly what he had been told to tell him. At the trial of the prisoner evidence was given, without objection, of statements made by him in answer to questions put to him by the policeman, through the interpreter, after this warning. There was no negation in terms of the absence of threats or promises or inducements, but apparently all that actually took place was related. The trial Judge was satisfied that the statements were not made under the influence of threats or promises or inducements made or held out to the prisoner:—

Held, that the evidence of the prisoner's statements was properly admitted; there was no necessity for a direct affirmation by the witnesses that no threats or promises or inducements were made or held out.

The Queen v. Thompson, [1893] 2 Q.B. 12, 17 Cox C.C. 641, distinguished.

Held, also, that it is not necessary in warning or cautioning a prisoner that a constable should say to him everything that is set forth in sec. 684 (2) of the Criminal Code.

CASE reserved for the opinion of the Court of Appeal by RIDDELL, J., as follows:—

1. The prisoner was charged with the murder of one Simoff, both Simoff and the prisoner being Macedonians.

2. The deceased Simoff was found dead in the kitchen of a house in which he and the prisoner and other Macedonians lived.

3. A policeman, Forbes, having been informed that a man had been killed, came to the said house and met the prisoner at the door-way and insisted that the prisoner should shew him where the dead body was. The two went together to the kitchen, and, as the prisoner did not speak English well (except a few words, appar-

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ently not at all), the policeman asked one Heller to interpret. The prisoner was not formally placed under arrest, but he was detained by the policeman, and would not have been allowed to go away had he so desired.

4. The policeman told the interpreter to tell the prisoner that he did not have to say anything unless he liked, and, if he did say anything, it would be used in evidence against him. This was told him then and there by the interpreter. It was proved at the trial that there was no promise or inducement held out to the prisoner by any one nor any threat made.

5. Thereupon and thereafter the policeman put questions to the prisoner through the interpreter as to his movements that morning, and the prisoner gave an account of his movements, which witness for the Crown at the trial swore was untrue.

6. Nothing was said by the prisoner upon this inquiry in the way of a confession or admission of guilt or of any fact tending to prove guilt, directly or indirectly, and the whole relevancy of the evidence of his statements was, that it was thereby proved that he gave a false account of his movements. Had his account been true, it would have been impossible that he was the murderer.

7. The prisoner was placed under arrest and taken to the police station.

8. There the policeman in charge, upon the same day and within a few hours of the former inquiry, through the same interpreter, told the prisoner that, in view of any charge that might be brought against him, he need not answer anything unless he liked, but anything he said would be used in evidence against him. It was not proved positively that no threats or promises or inducements were made or held out on this occasion—the question was not asked by either counsel: but the evidence, after the warning was proved, was not objected to, nor was there any pretence or suggestion that any threat or promise or inducement had been made or held out.

9. Thereupon and thereafter, in answer to questions, the prisoner again gave an account of his movements, the same in substance as before, which witnesses for the Crown at the trial swore was untrue.

10. Nothing was said by the prisoner upon this inquiry in the way of a confession or admission of guilt or of any fact tending to

prove guilt, directly or indirectly, and the whole relevancy of the evidence of his statements was that it was thereby proved that he gave a false account of his movements. Had his account been true, it would have been impossible that he was the murderer.

At the request of the prisoner's counsel, I reserve the following questions of law for the opinion of the Court of Appeal, that is to say:—

1. Was the evidence of statements made by the prisoner at the house properly admitted?
2. Was the evidence of statements made by the prisoner at the police station properly admitted?
3. Should there be a new trial because of wrongful admission of the said evidence or any part thereof?

The case was argued before MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 1st December, 1909.

J. M. Godfrey, for the prisoner. I do not dispute the admissibility of the evidence as to the statements on the first occasion. The onus is on the Crown to shew that the admissions made by the prisoner to the policeman after he had been placed under arrest were free and voluntary. This should be proved affirmatively, but the evidence adduced on behalf of the Crown falls short of doing so, and the onus is not discharged: *The Queen v. Thompson*, [1893] 2 Q.B. 12, 17 Cox C.C. 641. The prisoner should have received a warning such as is directed to be given under sec. 684 of the Code, that he had nothing to hope from any promise of favour, and nothing to fear from any threat, which might have been made to him in order to induce him to make any admission. The following authorities were referred to: Am. & Eng. Encyc. of Law, 2nd ed., vol. 6, p. 562; *Regina v. Cheverton* (1862), 2 F. & F. 833; *Rex v. Knight and Thayre* (1905), 9 Can. Crim. Cas. 356 n., 21 Times L.R. 310; *Rex v. Ryan* (1905), 9 O.L.R. 137; *The King v. Tutty* (1905), 9 Can. Crim. Cas. 544; *Regina v. Rose* (1898), 18 Cox C.C. 717; *The King v. Royds* (1904), 8 Can. Crim. Cas. 209; *The Queen v. Pah-Cah-Pah-Ne-Capi* (1897), 4 Can. Crim. Cas. 93; *The Queen v. Jackson* (1898), 2 Can. Crim. Cas. 149; *Rex v. Green* (1832), 5 C. & P. 312. [MEREDITH, J.A., referred to *The King v. Best*, [1909] 1 K.B. 692, as being opposed to the prisoner's contention.] The law on the matter is in a hopelessly confused state, and it is impossible to reconcile all the authorities.

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J. R. Cartwright, K.C., and *E. Bayly*, K.C., for the Crown. We do not quarrel with the *Thompson* case. Some of the other authorities cited are open to question. It appears in the *Thompson* case, [1893] 2 Q.B. 12, 17, that there was some ground for suspicion as to the confession being voluntary, which fact distinguishes it from the present case. Reference was made to the following authorities: *Regina v. Day* (1890), 20 O.R. 209; Roscoe's Criminal Evidence, 13th ed., p. 35; Joy on Confessions, p. 19; *Rex v. Court* (1836), 7 C. & P. 486.

Godfrey, in reply, pointed out that all the authorities assume that warning must be given to the prisoner.

December 14. Moss, C.J.O.:—Case reserved for the opinion of this Court by Riddell, J., after trial and conviction before him of the prisoner on a charge of murdering one Simoff.

The learned Judge admitted in evidence certain statements made by the prisoner in answer to questions addressed to him by a policeman through an interpreter. At the time the prisoner had not been formally placed under arrest, but he was detained by the policeman, and would not have been allowed to go away had he so desired.

The learned Judge also admitted in evidence certain other statements made by the prisoner in answer to questions addressed to him through an interpreter by another policeman after the prisoner had been placed under arrest and taken to the police station.

The substantial questions reserved are, whether the evidence of these statements was properly admitted.

Upon the argument counsel for the prisoner conceded that he could not successfully argue against the admission of the evidence of the firstly above mentioned statements; and, upon the facts and circumstances attending the occasion which were proved before the learned Judge admitted the evidence, there is no reason for doubting the correctness of his ruling.

As to the statements made on the second occasion, it was strongly urged by the learned counsel for the prisoner that enough was not shewn by the Crown as preliminary to their reception to justify the learned Judge in admitting them in evidence.

The case and evidence shew that the prisoner was placed under arrest and taken to the police station, where the policeman in

charge instructed the interpreter to tell the prisoner that, in view of any charge that might be brought against him, he need not answer anything unless he liked, but anything he said would be used in evidence against him. This was all that the policeman told the interpreter to say to the prisoner, and the interpreter told the prisoner exactly what he had been told to tell him. There was no negation in terms of the absence of threats or promises or inducements, but apparently all that actually took place was related. The learned Judge was satisfied that the statements were not made under the influence of threats, promises, or inducements made or held out to the prisoner.

It was contended for the prisoner that the evidence did not go far enough, inasmuch as there was no direct affirmation by the witnesses that no threats, promises, or inducements were made or held out. But all that was required was sufficient proof to satisfy the mind of the learned Judge, and from the facts sworn to before him he could readily draw the inference that the statements were not made under the influence of either hope or fear. The facts proved, themselves, demonstrated that neither coercion nor persuasion was resorted to in order to induce the prisoner to speak. He was informed that he need not answer any question unless he liked, and he was warned that anything he might say would be used in evidence against him. And nothing appears which would lead to the inference that he was not or might not have been answering the questions voluntarily and of his own free will.

Much stress was laid upon *The Queen v. Thompson*, [1893] 2 Q.B. 12, 17 Cox C.C. 641. The actual decision was that, on the broad, plain ground that it was not proved satisfactorily that the confession was free and voluntary, it ought not to have been received. The language of Cave, J., who delivered the judgment of the Court, must be read with reference to and in the light of the facts appearing in the case. The prisoner was under trial on a charge of embezzling certain moneys belonging to a company of which he was an employee. It was shewn that the chairman of the company, at whose instance the warrant for the prisoner's apprehension had been issued, and who was called as a witness to prove, among other things, a confession by the prisoner, had, prior to the confession, been called upon by the prisoner's brother and brother-in-law, and that in the course of the interview he had said

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to the prisoner's brother, "It will be a right thing for (the prisoner) to make a clean breast of it." It did not appear whether the details of this conversation had been communicated to the prisoner, but the chairman stated that he expected that what he said would be communicated to the prisoner. It was contended by the prisoner's counsel that the statements to his brother were inducements to him to confess held out by a person in authority, and that evidence of the confession was therefore inadmissible. The evidence was admitted, and a case was stated for the opinion of the Court upon the question whether the evidence of the confession was properly admitted. Cave, J., stated the test by which the admissibility of a confession may be decided. He said (p. 17): "They have to ask, Is it proved affirmatively that the confession was free and voluntary—that is, Was it preceded by any inducement to make a statement held out by any person in authority?" He added: "If so, and the inducement has not been clearly removed before the statement was made, evidence of the statement is inadmissible." Then, after dealing with the evidence, he proceeded (p. 18): "Taking the words of (the chairman) to have been 'It will be the right thing for (the prisoner) to make a statement,' and that those words were communicated to the prisoner, I should say that that communication was calculated, in the language of Pollock, C.B., to lead the prisoner to believe that it would be better for him to say *something*. All this, however, is matter of conjecture; and I prefer to put my judgment on the ground that it is the duty of the prosecution to prove, in case of doubt, that the prisoner's statement was free and voluntary, and that they did not discharge themselves of this obligation."

It is clear from these passages that the Court did not intend to lay down any new rule. The difficulty in the case was introduced by the statement made to the prisoner's brother, and the doubt whether or not it had been communicated to the prisoner. And the holding was that in such a case of doubt it was the duty of the prosecution to go further and shew either that the statement had not been communicated or that the inducement it suggested had clearly been removed before the prisoner's statement was made.

This case has no elements of this kind.

It was also argued that the warning or caution was insufficient, and that everything that is set forth in sec. 684 (2) of the Code should

have been said to the prisoner. But these directions are intended for the guidance of a justice holding a preliminary inquiry. The following section (685) shews that the law as to giving in evidence admissions, confessions, or other statements made at any time by an accused person, remains unaffected.

The first and second questions, which are the only material ones, should be answered in the affirmative.

OSLER, J.A.:—I am unable to discover any well founded objection to the admission of the prisoner's statements. He was, I should say, substantially under arrest when he made both, but he was warned that he was not obliged to make any statement, and that, if he did so, what he said might be used against him at the trial. It was proved affirmatively that, when he made the first, no threat was made nor any promise or inducement of any kind held out to him. That was not formally proved with regard to the second statement, but the circumstances under which it was made were deposed to, and there was no evidence or suggestion that such statement was made in consequence of any promise, threat, or inducement, and the learned trial Judge reports that the evidence of that statement, made after the warning, was given without objection, and that there was no pretence or suggestion of any promise, threat, or inducement. He evidently drew the inference that nothing of the kind had preceded or induced the second statement. There was thus no room for reasonable doubt on the point which in the case of *The Queen v. Thompson*, [1893] 2 Q.B. 12, led the Court to hold that the statement ought to be rejected. See also *Regina v. Rose*, 18 Cox C.C. 717; Phipson on Evidence, p. 228.

It was urged that the warning ought to have been given in the terms prescribed by sec. 684 of the Code for the guidance of a justice of the peace in addressing an accused person after taking the depositions on a preliminary inquiry before him, but sec. 685 shews that this is not so, and that admissions or confessions made at any time by such person, which are by law admissible as evidence, may be proved against him. The authorities clearly shew, and they have been constantly acted on, that evidence of statements made under the circumstances I have mentioned, by a prisoner in answer to interrogatories by a constable, is admissible: *The King v. Best*, [1909] 1 K.B. 692; *Regina v. Day*, 20 O.R. 209; *Roscoe*, 13th

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ed., p. 35. I refer also to *Rex v. Greenacre* (1837), 8 C. & P. 35, 36; *Rex v. Court*, 7 C. & P. 486.

The first and second questions reserved must be answered in the affirmative. It is unnecessary to answer the third question, which is not one which can be reserved under sec. 1074 of the Code. It is one which concerns the Court's own duty in dealing with the result of the appeal.

MEREDITH, J.A.:—The real question in this case is just such as the trial Court has stated, namely, whether there ought to be a new trial on the ground of the improper admission of evidence.

The first point for consideration is, whether there was an improper admission of any of the evidence referred to in the reserved case.

It is, of course, necessary for those who tender any evidence to first shew that it is competent.

In this case, putting it most strongly in the prisoner's favour, it was necessary for the prosecution to satisfy the trial Court that the statements of the prisoner, to the police constables, were made voluntarily, for, if induced by the influence of hope or fear, they would be inadmissible.

The circumstances under which the statements were made were detailed in evidence, and the evidence of them was admitted without objection, but it is now contended that the prosecution should have gone further, that the evidence ought not to have been admitted because the witness had not been categorically asked as to, and had not denied, the exercise of any such influence as would render the evidence inadmissible.

It is enough to say that there was no suggestion that the witness had not detailed all the circumstances, nor is there any apparent ground now for suspicion of any concealment of, or failure to disclose, any of them: every one seemed so well satisfied in this respect that the witness was not subjected to further questioning, and no sort of objection to the admissibility of the evidence seems to have suggested itself, at the time, to the mind of any one, as far as the case shews.

If, therefore, the trial Court were satisfied that the statements were not made under the influence of any improper inducement, they were, in my opinion, rightly admitted in evidence, even upon

the assumption that they were confessions within the rule before mentioned: see Taylor on Evidence, sec. 867; Am. & Eng. Encyc. of Law, 2nd ed., vol. 6, pp. 521-2; and Cyc., vol. 12, pp. 459,460.

The questions asked, I would answer accordingly.

GARROW and MACLAREN, JJ.A., concurred.

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Criminal Law—Attempts to have Carnal Knowledge of Child—Evidence of Child not on Oath—Criminal Code, sec. 1003—Corroboration—Sufficiency—Reasonable Evidence to Sustain Conviction.

The prisoner was charged with the indictable offence under sec. 302 of the Code of having attempted to have unlawful carnal knowledge of a child under the age of fourteen years, to wit, of the age of seven or eight years. The trial Judge received the child's statement, without oath, under sec. 1003 of the Code, and upon that and other evidence convicted the prisoner of the offence charged, but reserved for the opinion of the Court of Appeal the questions whether the child's statement was sufficiently corroborated to comply with the requirements of sub-sec. 2 of sec. 1003, and whether he was right in holding that there was sufficient evidence to justify his finding the prisoner guilty :—

- Held*, that the evidence of the child was sufficiently corroborated by : (a) evidence of the statement made to her mother within an hour or two after the occurrence—a statement volunteered by her, and not extracted by interrogation or suggestion ; (b) evidence of the condition of the child's clothing, as testified to by her mother and two other persons ; (c) evidence of the fact of the child having been with the prisoner during the time testified to as that during which his improper conduct took place.
2. That there was reasonable evidence on which, if believed, the defendant might be found guilty of the offence charged

CASE stated, at the request of counsel for the prisoner, by the Judge of the County Court of the County of Brant.

The prisoner was charged with having unlawfully attempted to have carnal knowledge of one Nellie Osborne, a child under fourteen years of age, and, having been arraigned before the learned Judge in the County Judge's Criminal Court, consented to be tried by the learned Judge without a jury, and was found guilty.

The child was then between seven and eight years of age, and the learned Judge, being of opinion that she did not understand the nature of an oath, but was possessed of sufficient intelligence to justify the reception of her evidence, and understood the duty

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of speaking the truth, received her evidence under sec. 1003 of the Criminal Code.*

Counsel for the prisoner objected that there was not in point of law sufficient or proper corroboration of the child's evidence, as required by sub-sec. 2 of sec. 1003 of the Code, and the learned Judge reserved for the opinion of the Court of Appeal the following questions:—

1. Was there sufficient corroboration of Nellie Osborne's statement to comply with the requirements of sub-sec. 2 of sec. 1003 of the Criminal Code?

2. Was I right in holding that there was sufficient evidence to justify finding the defendant guilty?

The case was argued before MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 1st December, 1909.

L. F. Heyd, K.C., for the prisoner, contended that the statement of the child made to her mother and received in evidence, was not voluntary, and was therefore inadmissible: *The King v. De Wolfe* (1904), 9 Can. Crim. Cas. 38; Phipson on Evidence, 4th ed., p. 98; *The King v. Bishop* (1906), 11 Can. Crim. Cas. 30; *The Queen v. Graham* (1899), 3 Can. Crim. Cas. 22. There might be evidence of an indecent assault, but there was not sufficient evidence of the offence for which the prisoner was convicted.

J. R. Cartwright, K.C., and *E. Bayly*, K.C., for the Crown, argued that the evidence was sufficient to support the conviction, and referred to *The King v. Osborne*, [1905] 1 K.B. 551, and *The King v. Burr* (1906), 13 O.L.R. 485.

* 1003. Where, upon the hearing or trial of any charge for carnally knowing or attempting to carnally know a girl under fourteen or of any charge under section 292 for indecent assault, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received though not given upon oath if, in the opinion of the court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

2. But no person shall be liable to be convicted of the offence, unless the testimony admitted by virtue of this section and given on behalf of the prosecution, is corroborated by some other material evidence in support thereof implicating the accused.

3. Any witness whose evidence is admitted under this section is liable to indictment and punishment for perjury in all respects as if he or she had been sworn.

December 14. Moss, C.J.O. (after stating the facts as above):—
The answer to the second question must depend upon the answer to the first question, for, if the child's evidence was sufficiently corroborated, there was undoubtedly evidence upon which the learned Judge might convict.

As appears from the stated case and the learned Judge's notes of the evidence, which are attached to and made part of the case, the prisoner took the child in his democrat waggon at about 10.30 o'clock in the morning, and drove her to a part of the city of Brantford some distance from her parents' home and said to be "more or less secluded." She was with him until shortly after 11.40 o'clock, when he let her down near the Central School, some distance from her home. Her mother, who had sent her upon a message, was looking out for her and saw her returning at about 11.50 o'clock. She noticed that the child's clothing was disarranged and her hair ribbon gone, but did not then notice the condition of her drawers, which she afterwards observed. She ordered her to her bedroom, and followed her to unfasten her clothes. She then noticed that her drawers were down and were wet. While her mother was removing the drawers, the child made a statement, which need not be repeated here, but which pointed to an attempt made by a man to penetrate her person. At the trial she identified the prisoner as the man, and repeated more fully and in greater detail what had been done.

Other witnesses testified to seeing the child driving with the prisoner, and one testified to seeing the child returning to her home "pretty near noon," and noticing that her drawers were hanging down.

The drawers were taken by the child's father to the police station, and subsequently to Dr. Ashton, who received them at 4.30 o'clock. He examined the child and found some slight symptoms. He examined the drawers and found upon them stains of semen. He cut out the parts and sent them to Toronto for examination by Dr. Ellis. They were examined by Dr. Goldie, who testified that he had submitted them to a microscopic examination and test and found them to contain human spermatozoa, beyond doubt.

There does not seem to be the slightest doubt that when he

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submitted them to the examination and test they were in the same condition as when they were sent by Dr. Ashton.

And the learned Judge found as a fact that the piece of the drawers examined by Dr. Goldie was the same piece sent to Toronto by Dr. Ashton, and was cut from the drawers by Dr. Ashton, and that the wet upon the drawers was spermatozoa.

The prisoner testified on his own behalf, and admitted that he had driven the child in his waggon and had let her down at the Central School shortly after 11.40 o'clock, but he denied that any such thing as said by her ever took place.

If the learned Judge believed, as he did, the evidence of the child's father and mother and of the other witnesses, their testimony corroborates that of the child in material respects, and implicates the prisoner. It tends to bring home to him the offence which the child charged against him, very soon after he had, according to his own admission, parted from her. Within a very few minutes after leaving him she is seen in the condition as to her clothing that has been described, and a few minutes later she makes the statement implicating him.

It was urged by Mr. Heyd that the statement was procured by questions, and was not free and voluntary. But this is not the effect of the evidence. It does not appear that any question was asked before she made the statement in explanation of the condition of her drawers. But, even if she were questioned, there are many questions which a mother or other person may properly ask which would not render inadmissible the answers made to them: *The King v. Osborne*, [1905] 1 K.B. 551, at p. 556.

The questions should be answered in the affirmative.

OSLER, J.A.:—The only questions reserved by the learned Judge of the County Court are: (1) whether the child's account of the offence attempted by the prisoner was sufficiently corroborated so as to comply with the requirements of sec. 1003 of the Criminal Code, which permits the evidence of a child of tender years to be received under certain circumstances, though not given upon oath; and (2) whether the learned Judge was right in holding that there was sufficient evidence to justify (him) in finding the defendant guilty.

The defendant was charged with the indictable offence, under

sec. 302 of the Code, of having attempted to have unlawful carnal knowledge of a child under the age of fourteen years, to wit, of the age of seven or eight years.

I am of opinion that the evidence of the child was sufficiently corroborated by the evidence: (a) of the statement made by her to her mother within an hour or two after the occurrence—a statement volunteered by her, and not extracted, so far as the evidence shews, by interrogation or suggestion on the part of the mother: *The King v. Osborne*, [1905] 1 K.B. 551; (b) of the condition of the child's clothing, as testified to by the mother and by the doctor and by Cyril Mulley; (c) of the fact of the child having been with the prisoner in his waggon or buggy during the time testified to as that during which his improper conduct took place. See the evidence of Atkins and of the prisoner himself.

By the second question the learned Judge meant, I assume, to ask whether there was any evidence or any reasonable evidence on which, if he believed it, he could find the charge proved, as he has not given leave under sec. 1021 to apply to this Court for a new trial on the ground that the verdict was against the weight of evidence. And this question I must answer by saying that there undoubtedly was such evidence, though for myself I must add that I should have been better satisfied if the conviction had been for indecent assault, as it is quite consistent with the evidence that nothing more than that was committed. It was, however, for the learned Judge to draw his own conclusion from the facts proved, and he, no doubt, gave the case full and careful consideration, having in view all the consequences of his finding.

The questions submitted must be answered in the affirmative.

MEREDITH, J.A.:—The question which the learned Judge has asked is, whether there was sufficient corroboration of the child's evidence to satisfy the requirements of sec. 1003 of the Criminal Code; but he cannot have meant sufficient corroboration in fact to warrant his conviction, for that question he would have no right to ask, nor this Court any power to answer. That which he must, therefore, have intended by the question was whether there was in law any such corroborative evidence as could support such a conviction; and in answer to such a question it is necessary only to point out, as was done during the argument of this appeal, and

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need not be repeated, that there was not only some corroborative evidence "implicating the accused," but that the child's story was, in one way and another, corroborated to some extent in almost, if not quite, all its details; and that with the weight of such evidence this Court cannot rightly concern itself; that was a matter for the consideration of the trial Court only.

Upon the child's evidence so corroborated a reasonable jury might find the accused guilty of the offence of which he stands convicted; and so holding, the jurisdiction of this Court over the case ends. No question was reserved as to the admissibility of any of the testimony.

I would answer the question by saying that there is legal evidence to support the conviction.

GARROW and MACLAREN, JJ.A., concurred.

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[IN THE COURT OF APPEAL.]

RE MARSHALL.

Succession Duty—7 Edw. VII. ch. 10, sec. 8 (O.)—*Valuation of Property by Executor*—*Inquiry by Surrogate Court Judge at Instance of Provincial Treasurer*—"Fair Market Value"—*Power of Judge to Reduce Valuation*—*Costs*—*Counsel Fee*—*Quantum*.

By sec. 8 of the Ontario Succession Duty Act, 7 Edw. VII. ch. 10, in force when the proceedings in this case took place, if the Treasurer of the Province is not satisfied with the value of any property forming part of the estate of a deceased person, as sworn to by the executor applying for probate, the Surrogate Court Judge shall, at the instance of the Treasurer, inquire as to the value so sworn to, and shall value all property at the fair market value; and sec. 4 enacts that in determining "dutiable value" the value shall be taken as at the date of the death of the deceased:—

Held, that the "fair market value" of any property must be determined by evidence of what could have been procured for it at the date of the death of the deceased, had it been then offered for sale.

And where the executor valued a farm, which was of uncertain value on account of its oil-producing capabilities, not fully developed at the date of the death, at \$20,000, and the Surrogate Court Judge, upon an inquiry at the instance of the Treasurer, reduced the valuation to less than \$12,000, the Court of Appeal, upon an appeal by the Treasurer, under sec. 10, restored the valuation of the executor.

Per OSLER, J.A., that the proceeding before the Surrogate Court Judge is not an appeal from the executor's valuation; it is rather a general inquiry into the dutiable value of the estate; and it is open, on the one hand to the Treasurer, and on the other to the executor, to prove what was the fair market value, with an appeal to either party from the decision of the Surrogate Court Judge.

Per GARROW, J.A., that the power of the Surrogate Court Judge was limited to increasing the valuation if, in his opinion, the evidence warranted an increase; he could not reduce the valuation below that of the executor.

Held, also, *per curiam*, having regard to sec. 10, sub-sec. 2, of the Act, and to item 153 of the County Court tariff, that the Surrogate Court Judge had no jurisdiction to direct payment of a higher counsel fee than \$25.

Judgment of the Judge of the Surrogate Court of Kent reversed.

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AN appeal by the Treasurer of the Province of Ontario from the judgment or order of the Judge of the Surrogate Court of the County of Kent, of the 5th June, 1909, in an inquiry, at the instance of the Treasurer, under the provisions of the Succession Duty Act, finding that the value of the assets of the estate of John Harwood Marshall, deceased, at the date of his death, was \$16,809.09, fixing \$620.70 as the amount of succession duty payable by the executor, and ordering the Treasurer to pay the costs of the solicitor for the executor and of the agent of the Official Guardian on the County Court scale, including a counsel fee of \$50 each to the solicitor for the executor and to the agent of the Official Guardian. This appeal was from so much of the judgment as related to the valuation of the south-east halves of lots 4 and 5 in the 9th concession of the township of Tilbury East, and as ordered the Treasurer to pay the costs, including \$50 for counsel fee to the executor and \$50 for counsel fee to the Official Guardian, and as fixed the succession duty at \$620.70.

The appeal was heard on the 13th October, 1909, by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A.

M. Wilson, K.C., for the appellant. The valuation of the land (including the oil rights and interests therein) of the deceased should be increased, and the amount of succession duty should be accordingly increased. By the Succession Duty Act the value of the land (including the oil rights or interests therein) should be fixed as at the date of the death of the deceased, whether the land increased or decreased in value afterwards; and the Judge improperly based his valuation upon evidence of the royalties received from oil produced from the land since the death of deceased. The Judge under-estimated the value of the land for agricultural purposes, and over-estimated the amount of injury to the land occasioned by portions of it being used for purposes of oil-production, and in any event he ought to have considered the land just as it was at the death, and taken its "fair market

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value" at that time, instead of trying to get at its "actual value," as he did. In this regard the Legislature have worded differently the Assessment Act, 4 Edw. VII. ch. 23, sec. 36, and the Succession Duty Act, 9 Edw. VII. ch. 12, sec. 4, in the former taking the "actual value" and in the latter the "fair market value" as a basis for computation. Even in the Assessment Act exception is made of mineral lands. "Market value" is defined in "Words and Phrases Judicially Defined," vol. 5, at p. 4383, as "the price that would in all probability result from fair negotiations where the seller is willing to sell and the buyer desires to buy." "Fair market value" is defined in the same work, vol. 3, at p. 2649. "Actual value" is what a thing is worth when one knows everything about it—in this case, the value of the property, if one knew how much oil was actually under the soil. The Judge did not go rightly about finding the fair market value. The direction of the Judge as to costs is also wrong. The executor values the land "for speculative purposes" at \$16,000. This should not influence the question of costs. "Speculative value" in "Words and Phrases Judicially Defined," vol. 7, p. 6608, is said to be "based on calculation of future prospects and contingencies." Speculative value had nothing to do with this case. The Judge had no power or jurisdiction to order the Treasurer to pay counsel fees of \$50 each to the solicitor for the executor and the agent of the Official Guardian. See the Succession Duty Act, 9 Edw. VII. ch. 12, sec. 14, sub-sec. 2; Cameron's Law of Costs in Canada, at p. 393, item 153; *Re Morrison* (1909), 13 O.W.R. 767.

W. E. Gundy, for Stephen Thorne Marshall, executor under the deceased's will. First as to costs. The value of the lands for agricultural purposes and the amount of injury to the land occasioned by portions of it being used for purposes of oil production, as fixed by the Judge, were fairly based upon the evidence. Under the Succession Duty Act it is provided that the costs shall be in the discretion of the Court or Judge, and shall be on the County Court scale. Upon the taxation of the costs an application was made to fix the counsel fees, and the Judge fixed the counsel fee at \$50 by virtue of the power conferred on him by the County Courts Act. If he exceeded his jurisdiction, the solicitors for the appellant should, upon the application to fix

counsel fees, have presented their objections to his power then and there. No appeal lies under the Act from the taxation of the costs to the Court of Appeal. This is the first time the Court of Appeal has been asked to consider the taxation of costs. Rule 774 of the Consolidated Rules governs appeals from taxation when costs are not solicitor and client costs. On the main appeal, there is little question raised as to the valuation of the land for farming purposes; the appeal is on account of the increased value from the presence of oil. It must be considered that the deceased had only a one-eighth interest in the oil. As to the "market value," the executor, immediately after the death of the deceased, advertised the land for sale, but no offers of purchase were made, so it was difficult for the Judge to find a "market value." Therefore he was reasonable and fair in the method he adopted to find the market value of the land; at least his method was much more accurate than could be arrived at by any one guessing at the value at the time of the death. The Judge fixed the value of the land as at the date of the death of the deceased; and the evidence of the royalties received from oil produced since that date was made use of by him for the purpose of arriving at the actual value of the lands at the date of death.

E. C. Cattanach, for the Official Guardian. The Judge was right in fixing the value of the lands as he did. There was no evidence shewing any market value of the property at the date of the testator's death. The judgment appealed from is right, and should be affirmed.

Wilson, in reply. The valuation should be \$30,000, on which the duty would be \$914.10.

December 14. OSLER, J.A.:—Appeal by the Treasurer of Ontario from the judgment (24th February—5th June, 1909) of the Judge of the Surrogate Court of the County of Kent.

The important question on this appeal respects the value of a farm, part of the assets of the estate of the deceased.

By the Succession Duty Act, 7 Edw. VII. ch. 10, in force when the proceedings which have given rise to the appeal took place, but which is now repealed by 9 Edw. VII. ch. 12, it was declared, sec. 3 (1) (h), that "dutiable value" means the value of the property devolving after the debts, incumbrances, and other allowances and

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exemptions authorised by the Act are deducted therefrom; and sec. 4 enacted that in determining "dutiable value" the value should be taken as at the date of the death of the deceased.

Section 7 provided that the executor applying for probate should make and file with the Surrogate Registrar a full, true, and correct statement under oath, shewing, *inter alia*, a full inventory in detail of all the property of the deceased, and the market value thereof, and that he should deliver to the Registrar before the issue of the probate a bond in a penal sum equal to ten per cent. of the sworn value of the property liable, or which might become liable, to succession duty, conditioned for payment of any duty to which the property coming to his hands might be found liable. The Treasurer might, of course, accept this valuation, and in that case the amount of duty payable in respect of the property valued would be governed by it; but sec. 8 enacted that, if the Treasurer was not satisfied with the value of any property as sworn to, or with the correctness of any inventory, the Surrogate Judge of the county in which the property subject to duty was situate should, at the instance of the Treasurer and upon such notice as the Judge should direct, inquire into the correctness of the inventory and as to the value so sworn to, and value any property improperly omitted, fix and settle the amounts of the debts and other allowances and exemptions, and assess the cash value of every annuity, term of years, life estate, income, or other estate, and of every interest in expectancy, as provided by the Act, and should value all property at the fair market value, and hear and determine all questions relative to the liability of property, the amount of duty, and the persons liable therefor.

Sub-section 4 provided that, in lieu of or in addition to evidence of valuation of property, the Judge might, in the first instance or at any time before judgment, issue a direction to the sheriff to make an appraisalment of the property mentioned in the inventory or any part thereof or of any property wrongfully omitted.

Sub-section (5) provided that, when so directed, the sheriff was forthwith to appraise the property at its fair market value at the date of death, and make a report in writing thereof to the Judge.

Section 10 enacted that the Treasurer, or any other person

interested, might, within thirty days from the date of the judgment of the Surrogate Judge, appeal to the Court of Appeal.

In substance all the foregoing provisions are found in the existing Act.

I do not regard the proceeding taken before the Surrogate Judge at the instance of the Treasurer as an appeal from the executor's valuation. It is not so spoken of. It is rather a general inquiry into the dutiable value of the estate, to be determined by the fair market value of the property at the date of the death of the deceased; and it is, in my opinion, open, on the one hand to the Treasurer, and on the other to the executor, to prove what was such fair market value, with an appeal to either party from the decision of the Surrogate Judge. The sworn market value must necessarily be an estimate of such value—what, in the best opinion of the executor, the property was worth; and the market value is the fair market value, that is to say, the price which, at the prescribed time, could probably have been obtained or made in the open market: *Belton v. London County Council* (1893), 68 L.T.R. 411.

In the face of the clear language of the Act, it cannot be maintained that, if the property at the prescribed date had a fair market value, such value could be reduced by proof of facts which, had they been known, would have made it then less valuable, or by proof of subsequent depreciation. The question remains, what was its fair market value at the date fixed by the Act? And that question must be solved by the evidence of what could then have been procured had it been offered for sale.

The executor valued the particular asset as worth at that time \$20,000, or, what is the same thing, the equity of redemption after deducting the incumbrance, at \$16,000.

The farm had a substantial value for agricultural purposes, but was chiefly prized for its supposed oil-producing capacity, not then fully developed, which led the testator to regard it as worth from \$30,000 to \$35,000, a price which the Treasurer contended was more nearly what it should be estimated at than the value placed on it by the executor's valuation, or that ultimately fixed by the Surrogate Judge, \$11,717.87.

There was, as might be expected, considerable difference in the opinions of the witnesses, some of whom were, I am inclined

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to think, swayed by their knowledge of the present value of the property; and, though the method adopted by the learned Surrogate Judge for arriving at his conclusion may have been a very reasonable one for ascertaining its actual value to any one who had purchased it just before the testator's death, that is to say, the value he would have found himself to have acquired irrespective of the price he had paid; that is not what the Act requires. There may be a fair market value for property held for speculative purposes, or of which the actual value tested by its revenue-producing qualities is unknown until discovered by exploration, boring, or other experiments; and that would appear to have been the case with these oil lands, for which much larger sums appear to have been paid than experience has shewn to be justified. And it was their condition as saleable properties, in the sense of the fair market value, though of a speculative or conjectural character, that was to be regarded in fixing their dutiable value. Difficult though it may be to form an accurate estimate, the evidence seems to me, taken as a whole, sufficient to warrant us in saying what is not too large a sum to fix as the fair market value if the testator had been really minded to sell. I think it reasonably clear that he might have got at least \$20,000, though it is also clear that he was not disposed to sell for so small a sum. The executor valued the property, as I have said, at \$20,000. It is true that this was only an estimate, and that he was not estopped from shewing that it was wrong, but that, considering that it was his sworn valuation, would have to be very clearly made out, and, in my opinion, it has not been done.

The appeal must, therefore, be allowed, and the learned Surrogate's valuation set aside, and that of the executor restored. It may be that the Crown, having regard to the smallness of the whole estate and the shrinkage in values which occurred immediately after the testator's death, will not be disposed to exact the uttermost farthing, but this is a matter with which we are not concerned.

A further objection was made to the learned Judge's order in respect of the allowance of \$50 each to the solicitor to the executors and the agent of the Official Guardian. Looking at sec. 10, subsec. 2, of the Act, which provides that the costs of all proceedings before the Judge shall be on the County Court scale, and at item

153 of the County Court tariff, it would appear that there was no jurisdiction to direct payment of higher counsel fees than \$25, and the learned Judge's order in this respect must be varied accordingly. In other respects the order as to the costs below will stand; and, success on the appeal being divided, there will be no order as to the costs of the appeal.

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MOSS, C.J.O., and MACLAREN, J.A., agreed with OSLER, J. A.

GARROW, J.A.:—This is an appeal by the Treasurer of the Province from the judgment of the Surrogate Judge of the County of Kent in a matter concerning the estate of the late Stephen Thorne Marshall, arising under the provisions of the Succession Duty Act, 7 Edw. VII. ch. 10.

The deceased owned at his death on the 1st December, 1906, certain lands, namely, the south-east halves of lots 4 and 5 in the 9th concession of the township of Tilbury East, subject to mortgages of \$4,000 and to certain oil and gas leases, with a reservation of royalties, the equity of redemption in which the executor in his sworn inventory valued at \$16,000. The date of the inventory was the 21st December, 1906.

From this valuation the Treasurer appealed, contending that it was too low, and the Surrogate Judge, after hearing the evidence of a number of witnesses, not only did not increase the executor's valuation, but reduced it to \$11,717.87, from which, as I read his judgment, a further reduction must be made of the amount of the mortgage, because, while the executor's valuation was of the equity of redemption, that of the learned Judge is of the land itself, and not merely of the equity of redemption.

The appeal of the Treasurer to the Surrogate Court Judge was taken under sec. 8 of the Act, which provides that in case the Treasurer is not satisfied with the value of the property as sworn to, or with the correctness of any inventory, the Surrogate Judge shall . . . at the instance of the Treasurer . . . inquire into the correctness of the inventory, and as to the value so sworn to, etc.

And the first question which arises is, could the Surrogate Judge, on such an appeal, reduce the valuation below that stated in the inventory, or was his power limited to increasing the valuation if, in his opinion, the evidence warranted an increase, other-

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wise merely dismissing the appeal? The latter is, in my opinion, the correct view.

The section (8), it is true, says that upon such an appeal the Judge shall inquire into the correctness of the inventory and as to the value sworn to by the executor; but, in trying to arrive at the true interpretation of the section, the plain object of the appeal, which clearly is to enable the Treasurer to prove that the valuation was too low, must not be lost sight of. There is nothing that I am able to see to suggest that it was the intention that upon such an appeal the whole question of value should be set at large, with the result that, the appeal failing, the executor might, without cross-appeal or notice of any kind, by new evidence falsify his own previous sworn valuation and claim and obtain a reduction.

That being my view of the construction of the section, it follows, if I am right, that the duty of the learned Judge was simply to inquire whether the Treasurer had by the evidence made a case for increasing the original valuation, and, if of the opinion that he had not, to dismiss the appeal. That the learned Judge was of opinion that the evidence did not warrant an increase is, of course, apparent, and in that conclusion I agree. The property, from its nature, was a difficult one to value with any degree of certainty. Its agricultural value was comparatively stable, but all else was more or less speculative. And, upon the whole, if it was necessary, in the view I take of the construction of the statute, to express an opinion upon the value, I would be inclined to agree with that of the executor rather than with the conclusion reached by the learned Judge. The time at which the value was to be taken was that of the death of the testator. The executor's oath was made only three weeks thereafter, when much of the oil afterwards won, and which enters so largely into the learned Judge's elaborate calculation, was still in the ground. How much or how little was there, no one then knew—an element of uncertainty which justified the executor's valuation—if it did not require him to value the land as he did, having in mind this uncertainty, for speculative purposes; the real question being its then value as an oil-producing territory.

The remaining question is as to the power of the Judge to allow an increased counsel fee of \$50 to each of the counsel engaged.

This depends upon the proper construction of sec. 10, sub-sec. 2, and of the County Court tariff, item No. 153, which provides that in ordinary County Court actions the maximum fee shall be \$25, but in actions of a special or important nature falling within the increased jurisdiction conferred by 59 Vict. ch. 19 the fee may be increased to a sum not exceeding \$50. It cannot be contended that these proceedings fall within the increased jurisdiction conferred by 59 Vict. ch. 19; and it follows that the ordinary rule which limits the fee to \$25 would apply.

The result is that, in my opinion, the valuation should be restored to that given in by the executor, and the counsel fees in question should be reduced to \$25 each, instead of the sums allowed.

The Treasurer should pay the costs of the appeal to the Surrogate Judge, and there should be no costs of the appeal to this Court.

MEREDITH, J.A.:—The duty of the Surrogate Court Judge was to fix the cash value of the land in question at the time of the testator's death; a duty the performance of which, in such a case as this, is made more difficult by the natural rebellion of the mind against taxation on fictitious values; but, whatever the result may be, the value at the time of the death alone must govern; and, it is but fair to add that, whatever other objection may be made to the rule, it is one which works both ways, though in this case the loss falls on the individual.

The Surrogate Court Judge took the fair value of the land for agricultural purposes, and added to that such amounts as had actually been realised from it through its oil-yielding qualities, and added to that again a speculative sum for the like future production; and deducted from these amounts a sum for injury to the agricultural uses through the oil-producing operations performed upon the land; and thus arrived at his valuation; a result which—I may interject—would need verification by the subsequent facts before I would be prepared to accept it as to the speculative amounts. If there had been no evidence of the actual value at the time of the death, his method might have been as fair a one as any other that could be devised for ascertaining the value at the earlier time; but there was such evidence; and it is quite manifest that, at the time of the testator's death, the land had

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a speculative value greater than that which is thus proved to have been its actual value—as far as that is really thus proved—for oil-producing purposes.

The learned Judge, therefore, in my opinion, acted upon a wrong method, and reached an erroneous conclusion; one which I cannot think either hinders or helps in finding the actual value of the land at the time of the death.

Its actual value then—for the purposes of giving effect to the enactment in question—was the amount for which it could then have been sold, its value in the market at that time, or, as required to be sworn to by the executor, “the market value thereof;” and no injustice is done, to the respondents at all events, if that value be fixed at the sum of \$20,000; the value more than once put upon it, under oath, by the executor, acting under the requirement of the enactment.

It was urged that the value could not be fixed at a sum less than \$30,000, because it was sworn that the testator had, in his lifetime, said that he had been offered that sum but wanted \$35,000. Even if one could be quite sure that that was just what the testator had said, and just the meaning he intended to convey, it would by no means make it conclusive, to my mind, that he had actually been offered, and could really have sold at, the sum named. When one is anxious to sell, he is apt to make statements of that kind, which the facts might not fully support.

I would allow the appeal, and fix the value at \$20,000.

[The judgment of the Court was that the appeal should be allowed in part and the value fixed by the executor confirmed. Counsel fee reduced to \$25. Costs of proceedings before Surrogate Court Judge to be paid by the Treasurer. No costs of the appeal.]

[BOYD, C.]

RE CARTER.

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Dec. 16.

Will—Construction—Residuary Estate—Distribution, after Death of Widow, among Children and Issue of Deceased Children—Period of Vesting—Advancement to Child—Grandchild Taking Subject to—Infant's Moneys—Retention in Court.

The testator by his will provided for payment of specified legacies to his children, and that the residue of his estate should be turned into money, invested by the executors, the income paid to the widow, and on her death "that all the residue of my estate is to be equally divided among all my children living at that time (the death of the widow) and the lawful issue of such as may be dead, *per stirpes*." There was also a provision that the shares *to go to* three of the children (one being H.) were to be dealt with according to the discretion of the executors.

The son H. was advanced to the extent of \$4,000 in his and his father's lifetime, and it was agreed between them that these advances were to be deducted from H.'s share of the father's estate. The other children also received advances on the same terms.

The will was dated in 1887; the testator died in April, 1897; H. died in August, 1898, leaving one child, born in November, 1897; and the widow of the testator died in 1908:—

Held, that there was no vesting of the residue or any share of it till the death of the widow; but that H.'s child took the share intended for his father as that father's representative (as indicated by the use of the words *per stirpes*), and, standing in his father's shoes, took it subject to deduction in respect of the advancement to his father.

Rose v. Rogers (1870), 39 L.J. Ch. 792, not followed.

In re Scott, [1903] 1 Ch. 1, followed.

Held, also, that the payment out of Court of the infant's share, \$30,000, to his mother and Surrogate guardian, though she was of ample means, should not be sanctioned.

MOTION by the executors of the will of James North Carter, deceased, under Con. Rule 938, for an order determining certain questions regarding the distribution of the estate of the deceased, under his will, having regard to the construction of the will, and to the events which had happened, set forth in the judgment.

The material provisions of the will were as follows:—

1. I will and bequeath to my daughter Emma . . .
\$3,000 . . .
2. I will and bequeath to my son Lucius . . . \$3,000
. . .
3. I will and bequeath to my daughter Augusta . . .
\$3,000 . . .
4. I will and bequeath to my children Jennie North Carter,
Harry Raymond Carter, and James North Carter . . . \$3,000
each . . . to be paid to them as they respectively attain
the age of twenty-one years. . . . Provided that if any one

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or more of said three children should die before attaining said age and without leaving lawful issue surviving, then his, her, or their legacy or legacies shall be equally divided among all my children then living. . . .

5. I will and direct that if my said sons Harry Raymond and James North or either of them shall, in the opinion of my said executors, be incapable of judiciously using said legacy or legacies to them given as aforesaid, my said executors may in their discretion withhold payment of the same, after they come of age as aforesaid, but shall in such case keep the same invested on good security and pay over the interest arising therefrom respectively to them annually until such time as my said executors may think it prudent or proper to pay over to my said two sons or either of them said legacy or legacies in full.

6. I will and devise to my wife Susan Carter my residence.

7. I give and bequeath to my said wife all my household furniture. . . .

8. I will and bequeath to my son Lucius Hart Carter the policy on his life . . . which he assigned to me, upon his paying to my executors as part of my estate all premiums paid by me upon said policy.

9. I will and direct my executors . . . as soon after my death as practicable . . . to sell all my lands not hereinbefore devised . . . and I authorise and empower my said executors . . . to make and execute all deeds and conveyances necessary. . . . And I direct my said executors to convert all the residue of my estate into money . . . and invest the same together with the proceeds of the sale . . . of my lands on good security, and pay the interest arising therefrom over to my said wife annually during her widowhood, and at the decease or marriage of my said wife, I direct all the residue of my estate . . . to be equally divided among all my children living at that time and the lawful issue of such as may be dead, *per stirpes*.

10. Provided, however, in regard to the shares to go to my said children Jennie North Carter, Harry Raymond Carter, and James North Carter, my said executors are to use the same discretion as to payment thereof as is hereinbefore provided as to their legacies of \$3,000.

11. I hereby nominate and appoint my said wife Susan Carter, my said daughter Emma Laurretta Evans, my said son Lucius Hart Carter, and my son-in-law Horace S. Wilcocks, executors of this will.

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The motion was heard by BOYD, C., in the Weekly Court, on the 15th December, 1909.

W. E. Middleton, K.C., for the executors and three of the beneficiaries.

C. A. Moss, for Jennie Irwin, a daughter of the testator.

McGregor Young, K.C., for M. B. Shannon, mother and guardian (appointed by a Surrogate Court) of the infant Raymond Stuart Carter, a grandchild of the testator.

F. W. Harcourt, K.C., for the infant.

December 16. BOYD, C.:—The question of construction on this will is one of nicety, as well as of difficulty, from the state of the authorities, which, though scant, are conflicting. The testator's will was dated in 1887, and he died in April, 1897. The infant grandchild now making claim was born in November, 1897; that child's father, Harry, son of the testator, died in August, 1898, and the widow of the testator (the life tenant) died in August, 1908.

The will provides for payment of specified legacies to the children, which have been paid, and as to which no question arises. The residue of the estate is to be turned into money, invested by the executors, the income paid to the widow, and on her death the direction is "that all the residue of my estate is to be equally divided among all my children living at that time (the death of the widow) and the lawful issue of such as may be dead, *per stirpes*."

The testator also provides that the shares to go to . . . Harry and James are to be dealt with according to the discretion of the executors in case the executors are of opinion that the sons are not capable of using the same judiciously. The only point made here is that he speaks of *the shares to go to* these sons.

It is admitted that the son Harry was advanced to the extent of about \$4,000 in his and his father's lifetime, and that it was agreed between them in writing that these advances were to be deducted from Harry's share of the father's estate. The other children also received advances on the same terms. Thus the

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situation presented is : advance to the son Harry of moneys which are to come out of his share of the estate (the residue); the death of the son before the period fixed for division, leaving an infant; and the death of the widow, which occasions the final distribution of the estate. The infant claims to take the share of the estate which the father would have taken, without bringing the advances into account; the children of the testator contest this, and claim that the infant's share should be allotted in the same manner as the other shares, subject to diminution according to the amount of the advances.

The Surrogate Judge passed upon this contention, and held that satisfaction for the advances to the father must come out of the infant's share. This ruling was set aside on appeal, as being a matter outside of his jurisdiction; and it comes before me as an original matter without any indication from the Court that vacated the Surrogate order.

If I could take the view of the Surrogate Judge that the share vested in the father, Harry, that would conclude the matter—as the infant must then take that share such as it is and subject to all proper deductions. But, as I read the will, there was no vesting of the residue or any share of it till the death of the mother. The whole was kept in the hands of the trustees till then, and only then were the recipients to be ascertained. It was then and not sooner to go to the children who should be living and to the issue of those who died before that event. The vesting is not helped at an earlier period by the use of the word “share” in paragraph 10 of the will. The words there used are “in regard to the shares *to go to* my sons,” not “the shares of my son.” The reference is to the portion that was about to go to him if he survived his mother.

Taking it then as a share of the residue which first vests in the infant, does he take it as an independent gift or not? Is he in a better position than his father, had his father survived? The cases are in conflict.

Rose v. Rogers, before Romilly, M.R., in 1870, reported 39 L.J. Ch. 792, is in favour of the infant, and appears to me not materially distinguishable from this case. The estate was of a residue held in trust for all children living at the testator's death, in equal shares. If a child should die in the testator's life, leaving

issue, such issue should stand in the place of and be entitled to the share which the parent would have had if living—and should take the same as between themselves in equal undivided shares as tenants in common. After the will one son was advanced £500 and died in the testator's life, leaving issue. Here the estate had not vested in the son, as in the case in hand. The Master of the Rolls held that the child was entitled to the share which the parent would have taken. He says: "Share of what? The residue." And proceeds: "Suppose he had said, that if there were no issue he gave it to A. B., could it have been contended that A. B. would have had to pay the parent's debt? There would have been satisfaction clearly as regards the parent" (the advance was enough to swamp the share), "but there is none as against the issue."

The same substantial question arose in *In re Scott*, [1903] 1 Ch. 1, in which Kekewich, J., follows *Rose v. Rogers*. Testator gave residue "in trust for all my children who may be living at my decease in such proportions that the share of each of my sons shall be double the amount of the share of each of my daughters, and that the shares of my daughters shall be equal;" any advance to daughters not to be brought into account in ascertaining shares of daughters in residue. "If any child of mine shall die in my lifetime, leaving a child or children who shall survive me, and . . . attain twenty-one . . . he shall take (and if more than one equally between them) the share which his . . . parent would have taken of and in my residuary trust estate if such parent had survived me." John was advanced £5,000, and died in January, 1899, leaving widow and daughter, who married Bland. Testator died 12th May, 1899; will of June, 1891, and codicil, 1894. Kekewich, J., held that, even if John had been liable to account, he never took a share under the will, and his daughter, who took the share which John would have taken had he survived the father, was not liable to account for what the father had received: *Rose v. Rogers*. The testator's daughters appealed. Counsel on one side said the Court below decided that, even if John was liable to account, his daughter as representing him is not under the same liability. Counsel (Warrington) on the other side said that, even if John had been bound to account for the gifts made to him, this does not apply to the daughter,

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who does not take his share under the will, but is substituted for him. Vaughan Williams, L.J., said (as dictum): "We cannot agree with the conclusion of the learned Judge as to the position of John's daughter. We think it is plain that she could take only that which her father would have taken, and it is impossible to arrive at the conclusion that in the case of the father the result would have been different from that in the case of the daughter, who was to take an interest in the event of his death before the testator." This was also a case of estate not vested in the father, and the opinion of the three Judges, Vaughan Williams, L.J., Stirling, L.J., and Cozens-Hardy, L.J., as expressed in the citation I have made, is sufficient to give the quietus to *Rose v. Rogers*. I do not think it should be followed.

In this case the testator, by the expression used, "*per stirpes*," shews that he was considering the issue of a deceased son in their representative capacity. It is not as if he had given it over on the death of the son to a stranger A. B. (the case put by Lord Romilly), but it is given to the issue as representatives of their father. That there is only one child does not affect the construction of the words. That is the point of contest between the opposing counsel in discussing *Rose v. Rogers* in *In re Scott*: the one claiming that the daughter representing the father was under the same liability; the other, that the daughter does not take the father's share under the will but in substitution for him. The view of the Judges on the point would indicate that if the gift on the son's death was to a stranger it would be a substitution, but if to his issue as such it would be as his representatives.

If the claimant in this case takes as the representative of his father, he must take the share intended for the father, subject to any drawback for advancement. Indeed, only in this way could there be equal distribution of the residue, as the testator intended; all the children who take it must account for moneys received from the testator by way of advancement, and the claimant must share the equality in that respect, because standing (so to speak) in the shoes of his father.

The share of the claimant must, therefore, be reduced by the amount so advanced to the father. See *Re Lewis Estate* (1898), 29 O.R. 609, which was, however, a case of intestacy.

Upon the other matter argued it seems to me clear and accord-

ing to the settled policy of the Court not to sanction the payment out of some \$30,000, the share of the infant, to his Surrogate-guardian—even though she is the mother and of ample means. She has married again, and the interest of the infant will be better protected, at all events to the satisfaction of the Court, and probably with less expense and more profit, by being paid into Court, than by being left to the risk and chances of an investment carrying more than four per cent.

The costs will come out of the estate.

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Constitutional Law—Powers of Provincial Legislature—Authorising Municipal Corporations to Acquire and Distribute Electric Energy—B. N. A. Act, sec. 92 (8), (10)—Validation of Contracts with Hydro-Electric Power Commission—Stay of Pending Actions—Right of Court to Inquire into Validity of Statutes.

The statutes 6 Edw. VII. ch. 15, as to electrical power, 7 Edw. VII. ch. 19, superseding the former, except as to contracts already entered into, 8 Edw. VII. ch. 22 and 9 Edw. VII. ch. 19, both providing for the validation of by-laws and contracts made under the former Acts, are *intra vires* of the Ontario Legislature.

By sec. 8 of the last-mentioned Act, it is provided that every action theretofore brought and then pending wherein the validity of a contract or by-law validated by the Act is attacked, shall be forever stayed:—

Held, that it was open to the Court, notwithstanding the wide language used—referring to this very action—to inquire into the legislative competence to deal with the whole subject-matter.

The supply of light is a proper function of municipal administration; and a municipal corporation may be authorised to engage in the business of acquiring and distributing electric energy, as one of the incidents of municipal government, and coming within the words “Municipal Institutions in the Province:” sec. 92 (8) of the British North America Act. The Provincial Legislature has power to establish electrical works as a local work or undertaking under clause 10 of the same section; and consequently it has power to delegate this undertaking to a competent municipal body. This does not infringe upon “Trade and Commerce,” as used in sec. 91 (2)—these words point to political arrangements in regard to trade, regulation of trade in matters of inter-provincial concern, and the like.

The provisions of the statutes above-mentioned, validating the by-law and contract of the defendants and staying the action, are within the competence of the Legislature. When the Provincial Legislature exercises plenary power within the constitutional limits of the Imperial Federation Act, any statute so enacted is not to be revised or supervised by the judicial body.

Declaration that the statutes are within provincial competence, but no further order, and no costs.

Decision of RIDDELL, J., affirmed.

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ACTION by a ratepayer of the city of London, suing on behalf of himself and all other ratepayers, against the city corporation, for a declaration that a certain contract made between the defendants and the Hydro-Electric Power Commission of Ontario was void, and for an injunction restraining the defendants from acting upon the contract. See the report of the judgments upon interlocutory motions in this case and in *Beardmore v. City of Toronto* (1909), 19 O.L.R. 139; and the report of the Chancellor's judgment after the trial of the latter case: *post* 165.

This action was tried before RIDDELL, J., without a jury, at London and Toronto, on the 15th March and 16th April, 1909.

E. F. B. Johnston, K.C., and *J. M. McEvoy*, for the plaintiff.

E. E. A. DuVernet, K.C., and *A. H. F. Lefroy*, K.C., for the defendants.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

May 4. RIDDELL, J.:—It was not from any real doubt as to what my conclusions should be that I reserved judgment—I did so only out of deference to the arguments so strenuously urged by counsel for the plaintiff, and in view of the very great importance of the questions to be determined.

When it is said that in this action the question is squarely raised, "Has the Legislature of the Province of Ontario the power to stay the hand of His Majesty's Courts in this Province, and to say to them, 'You shall not decide the rights of litigants in certain actions now pending,' and to the litigants, 'You shall not further litigate your alleged rights'?" it will be apparent that the matter for consideration is of the most momentous character.

The facts are simple and not in dispute.

By the Ontario Act of 1906, 6 Edw. VII. ch. 15, power is given to the Lieutenant-Governor in council to appoint three persons to form a Commission, which Commission should be a body corporate under the name of "The Hydro-Electric Power Commission of Ontario." By sec. 6 of the Act, any municipal corporation is authorised to apply to the Commission for the transmission of electricity "for the uses of the corporation and the inhabitants thereof." Section 7 authorises the submission to the electors of a by-law authorising the corporation to enter into a contract in

the form supplied by the Commissioners; in case the by-law is passed, the Commission and the corporation may execute the contract.

In pursuance of the powers given by this Act, the municipal council of the city of London, on the 3rd December, 1906, read a by-law, No. 2920; then submitted the by-law to a vote of the electors; and, after the vote, finally passed it on the 14th January, 1907. This by-law recites the Act of 6 Edw. VII. ch. 15, in part, and enacts that "it shall be lawful for the mayor and clerk . . . to execute a contract with the Hydro-Electric Power Commission of Ontario for the supply to the said corporation of electrical power or energy for the uses of the corporation and the inhabitants thereof, for lighting, heating, and power purposes at" It is plain and not disputed that the object of the corporation was to procure this electrical power to sell it again. A contract was entered into with the Commission, which is set out *verbatim et literatim* in schedule A to the Act 9 Edw VII. ch. 19.

This action was begun on the 16th June, 1908, by the plaintiff, a ratepayer and freeholder of London, against the municipality, for a declaration that the contract is not valid, and asking for consequent relief. The defendants assert the validity of the contract, and in addition say that the action ought not to proceed without the Commission a party. There have been certain interlocutory proceedings which in the view I take of the case need not be detailed.

The action came down for trial before me at the London Assizes; I was informed that legislation in reference to the contract was pending as a "Government measure." I accordingly heard all the evidence adduced, and postponed the argument until it should be seen what course the Legislature would take.

The Act 9 Edw. VII. ch. 19 was assented to on the 29th March, 1909. By sec. 2 of this Act it is enacted that certain changes shall be made in the contract, and by sec. 3, that with these changes the contract shall be valid and binding according to the terms thereof upon the corporation of the city of London and other corporations named. By sec. 4, it is "declared and enacted that the validity of the said contract as so varied as aforesaid shall not be open to question on any ground whatever in any Court, but

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shall be held and adjudged to be valid and binding on all the corporations mentioned in section 3." Section 8 says: "Every action which has been heretofore brought and is now pending wherein the validity of the said contract or any by-law passed or purporting to have been passed authorising the execution thereof by any of the corporations . . . is attacked or called in question, or calling in question the jurisdiction, power or authority of the Commission or of any municipal corporation or of the councils thereof or of any or either of them to exercise any power or to do any of the acts which the said recited Acts authorise to be exercised or done by the Commission or by a municipal corporation or by the council thereof, by whomsoever such action is brought, shall be and the same is hereby forever stayed."

This is a very stringent section; and, if the legislation is not *ultra vires*, it would seem impossible for the plaintiff to continue this action.

Notwithstanding the recrudescence in some quarters of the old political heresy as to the constitutional position of the Provincial Legislature—the heresy which considered the Legislature as a "big county council"—there can be no doubt of the extent of its powers. Our Legislature is a Parliament, not a municipal council. Counsel for the plaintiff expressly stated that they did not contend that the Legislature exercised its powers by delegation from the Imperial Parliament; but most of their argument logically rested in substance upon some such proposition.

The extent of the powers of the Legislature has never been in the least doubtful in law. "The . . . Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it . . . has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself." So said the Judicial Committee of the Privy Council of an Indian Legislature in *The Queen v. Burah* (1878), 3 App. Cas. 889, 904; and of the Legislature of our own Province their Lordships said: "When the British North America Act enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to matters

enumerated in sec. 92, it conferred . . . authority as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its powers possessed and could bestow. Within the limits of subjects and area the local Legislature is supreme, and has the same authority as the Imperial Parliament . . . :” *Hodge v. The Queen* (1883), 9 App. Cas. 117, 132. It is needless to multiply citations; whenever the matter has come up for decision in the Court of final resort, the result has been the same.

The powers of the Legislature of the Province are the same in intention, though not in extension, as those of the Imperial Parliament. The Legislature is limited in the territory in which it may legislate, and in the subjects; the Imperial Parliament is not—that is the whole difference.

The extent of the powers of the Imperial Parliament is not doubtful. “The power and jurisdiction of Parliament . . . is so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds. . . . It can in short do anything that is not naturally impossible:” Blackstone Comm., vol. 1, pp. 160, 161. “It is a fundamental principle with English lawyers that Parliament can do everything but make a woman a man, and a man a woman,” says DeLolme. “An Act of Parliament can do no wrong, though it may do several things that look pretty odd:” Sir John Holt, C.J., in *City of London v. Wood* (1700), 12 Mod. 669, at pp. 687, 688.

Sir Edward Coke, who advanced the proposition in *Bonham’s Case*, 8 Co. 118 (a), that “the common law will controul acts of parliament, and sometimes adjudge them to be utterly void,” was properly rebuked by Lord Ellesmere (see note to the case in Thomas & Fraser’s edition of Co. Rep., vol. 4, pp. 376, 377). As is pointed out by Dicey, Law of the Constitution, 7th ed., p. 59, note (1), “This dictum once had a real meaning . . . but it has never received systematic judicial sanction and is now obsolete.” “A modern Judge would never listen to a barrister who argued that an Act of Parliament was invalid because it was immoral or because it went beyond the limits of Parliamentary authority:” Dicey, pp. 60, 61. “There is no legal basis for the theory that Judges, as exponents of morality, may overrule Acts of Parliament:” *ib.*, p. 66.

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There is consequently nothing more than the veriest legal commonplace in the description given of the powers of the Legislature in the case of *Florence Mining Co. v. Cobalt Lake Mining Co.* (1908), 18 O. L. R. 275, at p. 279: "In short, the Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule, human or divine." A writer in the *Canada Law Journal*, vol. 44, at p. 554, says: "The Imperial Parliament is bound by rules both human and divine, but they are rules of its own making, or arising naturally from its constitution and environments." No example is cited—and it must be obvious that a sovereign body cannot be said to be bound, *i.e.*, legally bound, by any rules of its own making. No sovereign body continuing sovereign can devolve its sovereignty so as to prevent itself taking up the sovereignty again. And any rules arising from the constitution and environments, if the body is sovereign, may at any time be abrogated (if that be naturally possible) by the sovereign body. While, as has been pointed out above, a British Judge could not listen to an argument that a statute of the Imperial Parliament is invalid because it goes beyond the limits of Parliamentary authority, the position of a Judge in respect of a Canadian statute, Dominion or Provincial, is quite different. "In Canada, as in the United States, the Courts inevitably become the interpreters of the Constitution:" Dicey, p. 164. The powers of the Legislatures being confined to certain specified subjects, the Courts must necessarily determine in each particular case whether the subject of the legislation is within the specified classes.

The question to be determined is: Does the right (of course when I speak of right, I mean legal right—power) to say to the Court, "You shall not decide this case," exist in the Provincial Legislature? And that, again, simply involves the question, "Does the asserted right come within any of the classes mentioned in sec. 92 of the British North America Act?"

Section 92 of the British North America Act gives the Province the exclusive right to "make laws in relation to matters coming within 'certain' classes of subjects," amongst them "Property and Civil Rights in the Province." Now, "the right to bring an action is a civil right:" Moss, C.J.O., giving the judgment of the Court of Appeal in *Florence Mining Co. v. Cobalt Lake Mining Co.* (1909), 18 O. L. R. 275, at p. 292. This right has been taken from numberless persons by statutes of limitations and similar legislation of undoubted validity.

An enactment of the Imperial Parliament preventing certain wrongs being actionable was under consideration by the Court of Appeal in England in *Conway v. Wade*, [1908] 2 K.B. 844. Farwell, L.J., says (p. 856): "It was possible for the Courts in former years to defend individual liberty against the aggression of kings and barons, because the defence rested on the law which they administered; it is not possible for the Courts to do so when the Legislature alters the laws so as to destroy liberty, for they can only administer the law. The Legislature cannot make evil good, but it can make it not actionable." In that case the learned Lord Justice says (p. 857): "I regret the conclusion, because I think it inflicts a cruel hardship on the plaintiff. . . . The conduct of the defendant is morally 'an . . . improper and inexcusable interference with the man's ordinary rights of citizenship,' but those rights have been cut away and the remedy for them destroyed by the Legislature."

Many acts of indemnity have been passed by legislatures—these acts prevent the bringing or carrying on of actions—"prohibiting civil suits and criminal prosecutions in respects of acts done." A partial list will be found in the great judgment of one of the greatest of English Judges, Willes, J., in the celebrated case of *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1, at pp. 17, 18—statutes of England beginning with 1 Edw. III. stat. 1, down to 19 Geo. II. chs. 30, 39: of Ireland; the Cape; Canada in 1838; Ceylon; St. Vincent; New Zealand: and this case of *Phillips v. Eyre* upheld the validity of such a statute passed by the Legislature of Jamaica. This statute prevented the well-known Governor Eyre suffering the consequences of his acts. The fact that the Court of Queen's Bench in this case refers, without any doubt as to its validity, to a statute of this kind passed in Canada, indicates their view that it was perfectly valid—and the judgment is conclusive as to the powers, in that regard, of a Colonial Legislature.

In *Delamatter v. Brown* (1908), 13 O.W.R. 58, at p. 63, it is said: "If the Legislature has in fact said that the true boundary between two adjoining lots is to be determined by three farmers or by a land surveyor, it is my duty loyally to obey the order of the Legislature and stay my hand; the Legislature has the legal power—and that is all I may concern myself about—to say that His Majesty's Court shall not determine the property rights of His

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Majesty's subjects in respect of the extent of their land. . . . :”
The Divisional Court in the same case (1909), 13 O.W.R. 862, does not question this statement of law (*vide* p. 867).

The power of the Legislature of Ontario and that of the Imperial Parliament being in this regard the same, the judgment of Farwell, L.J., in the case cited shews that, even if I had come to the conclusion—which I have not—that the plaintiff was grievously wronged, my power would not be increased. “Where there is jurisdiction over the subject matter, arguments founded on alleged hardship or injustice can have no weight:” Moss, C.J.O., 18 O.L.R. at p. 293.

It is contended that to deny the right of this plaintiff to have his claims passed upon by the King's Court is in breach of Magna Carta. Whatever Magna Carta may be in law, whether a treaty between King and subjects, charter or grant by the King, declaration of rights, constitution, statute, or what not, “it is also a long and miscellaneous code of laws:” Pollock & Maitland, vol. 1, p. 658; “the first great public act of the nation after it had realised its identity:” Stubbs, Const. History, vol. 1, p. 571. But it is equally true that much of Magna Carta is obsolete, and that the Imperial Parliament has not hesitated, whenever occasion called for it, to legislate away its provisions; *e.g.*, ch. 11: “If any one die indebted to the Jews . . . if any children of the deceased are left under age, necessities shall be provided for them in keeping with the holding of the deceased and out of the residue the debt shall be paid. . . .” No one supposes this law now exists. Chapter 18, “Justices in Eyre” are provided for, but they disappeared by 1400. Chapter 27: “If any freeman shall die intestate, his chattels shall be distributed by the hands of his nearest kinsfolk and friends under the supervision of the Church. . . .” The Church has long disappeared from the administration of estates. Chapter 42, “reserving always the allegiance due to us,” on the principle “*Nemo potest exuere patriam.*” This was wholly done away with; “a series of statutes culminating in the Naturalisation Act of 1870 have entirely abrogated this ancient doctrine and substituted one of perfect liberty:” McKechnie, Magna Carta, p. 477. I hesitate to speak of ch. 45: “We will appoint as justices, constables, sheriffs, or bailiffs, only such as know the law of the realm and mean to observe it well.” The celebrated chapter 40,

"*Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam*"—To none will we sell, to none will we deny or delay right or justice"—much misunderstood as it has been, beyond any question contains the cardinal principle that all are entitled to the enforcement and the prompt enforcement of their legal rights. Any interference with the full performance of the promises of this chapter will be jealously guarded by the Courts; but even this is subject to the will of the Legislature in the mother country and here. It is needless to give further instances of the power of the Imperial Parliament to nullify provisions of Magna Carta. I shall mention cases in Canada. In *Ex p. Gould* (1854), 2 Mathieu Rev. Rep. 376, 378, Mr. Justice Day says: "Almost every statute interferes . . . with vested rights. . . . The powers of legislation of the Provincial Parliament are as extensive as those of the Imperial Parliament, while they keep within the limits fixed by that statute, even if they were to interfere with Magna Carta." These words are cited with approval by the Chancellor, who adds: "Such also is the position of the Province under Confederation:" *Re McDowell and Town of Palmerston* (1892), 22 O.R. 563, at p. 565. Girouard, J., in the Supreme Court of Canada, in the case of *In re Provincial Fisheries* (1896), 26 S.C.R. 444, at pp. 554, 555, points out that the restrictions of Magna Carta in respect of navigable waters "have been removed by colonial legislation before Confederation in most, if not all, of the Provinces," and he considers that, therefore, "they are of no importance for the determination of the questions submitted to" the Supreme Court.

It is sometimes said that the British Parliament could not in passing the British North America Act have intended to confer on a local Legislature such unlimited powers. The best way of determining what a Parliament intends is to find out the meaning of what it says. The meaning of the language is perfectly plain and does not admit of question. Those who assert that the British North America Act does not express the real meaning and intent of Parliament, it seems to me, forget that practically all the power Ontario has, she had from the time of the Act of 1791, 31 Geo. III. ch. 31. It was not just the other day that our Province "came of age"—she is over 100 years old. All the powers we have been considering in this action and those considered in the *Cobalt* action, were undoubtedly hers since 1791. And I much mistake the temper of my countrymen

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if they in 1867 would have been or would now be content to accept any legislation which cut down in any wise their power of governing themselves. All these powers are possessed in fact by our kinsmen across the seas, and for myself I can see no reason why our rights in Ontario in local matters should be any less than the rights of those in the British Isles—why Britons on this side of the Atlantic should any less govern themselves than those on the other.

Nor were those who drew up the British North America Act ignorant men. The colonial statesmen were men of great ability, who knew what they wanted, and knew how to put in plain language what they did want—they had the assistance of the ablest lawyers in England—they were experienced legislators themselves—and it is idle to speak of the result of their labours as being other than what was intended. That is, however, quite aside from the matters to be here decided.

Courts by whose judgments I am bound have decided in unmistakable language the meaning of the Act, and the result is inevitable. The Legislature had undoubtedly the power to pass sec. 8 of the Act of 9 Edw. VII.

This action, it is plain, comes within the letter, as well as the spirit, of this sec. 8. The Legislature has said that this action shall be stayed. My duty is “loyally to obey the order of the Legislature”—the action is accordingly stayed.

While the wording of the statute is that the action shall be “forever stayed,” the Legislature has no power to control by anticipation the actions of any future Legislature or of itself; it may be that this legislation may be repealed—or it may be that the legislation may be disallowed—the result is that the stay ordered by the statute has the effect of causing the Court to retain the action, with no proceedings to be taken unless and until the legislation is in some way got rid of.

On the question of costs my own decision in the *Cobalt* case is cited. In my humble judgment, when the Legislature takes within its own cognizance and decides the private rights of individuals, it must be considered as intending to deal exhaustively with such rights and also with the actions then pending in respect of such rights—and in all respects; and if there be no provision made in the legislation for the costs of the actions, it must be considered that the Legislature did not intend that costs should be

paid by either party. Upon the enactment taking effect, any party proceeds at his own peril—and if it be found that the legislation makes his contention untenable, he should pay the costs occasioned after he should have stayed his hand. Thus in the *Cobalt* case, all rights of the plaintiffs—if they had any—were taken away by the Act of 1907; they should not have proceeded with the action after the passing of that Act—their action was not stayed by the Legislature, and they, therefore, had the legal right to proceed; but, failing, they were ordered to pay the costs after the time at which they should have stopped. As to the costs before the passing of that Act, the Legislature had before its mind the fact that the litigation was going on, and made no provision for the costs—I thought I should not award costs. Had the Legislature intended the Court to have any control over the costs, it would have said so. This was the principle of the award of costs in that case, and it had no other significance.

In the present case, however, the Legislature has not simply determined rights by legislation, leaving it open to the litigants to ask the Courts to declare the rights—the Legislature has, on the contrary, stayed the action itself—making no provision for costs. I can give no costs. Such an award of costs would itself be a proceeding with the action.

I can only declare that this action is stayed by legislation—and retain the action till further order.

Had I thought that sec. 8 was inoperative, I should have required to consider the effect of the Act of 9 Edw. VII. in validating the agreement or rather making a new agreement between the Commission and the city of London. It is not necessary that I should go into that question—but there can, in my view, be no doubt of the power of the Legislature to authorise a municipality to make any bargain, or to make any bargain for any municipality thought advisable. The municipality in Ontario is wholly a creature of the Legislature—it has no abstract rights—it “derives all its powers from statute, and the same hand which gave may take away.” *In re Hassard and City of Toronto* (1908), 16 O.L.R. 500, at p. 511. Further rights may be given by the Legislature to municipalities, because that is legislation in respect to municipal institutions, and also it is a matter “of a merely local nature in the Province.” The Legislature might give a municipality any

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powers of dealing in any substance, even though or if it were expressly created for another purpose—municipalities supply water—in London, England, for generations a private commercial enterprise; gas, still with us in most cases a private commercial enterprise; electric light, to which the same remark applies; buy Crown or other wet lands, drain and sell them, making money if they can (3 Edw. VII. ch. 19, sec. 556); buy land for parks or exhibition purposes and lease them (ditto, sec. 576); form cemeteries and sell lots therein (ditto, sec. 577); construct and own telephones (ditto, sec. 570). And many other things they may undoubtedly do which are or may be matters of commercial enterprise. Why not, then, electricity for power or light? All that is for the Legislature to say. And, if the Legislature can legally say in general terms that a contract in the form like that set out in schedule A of the Act of 1909, as amended by the statute, should be valid if executed by any municipality, I fail to understand why the Legislature cannot say that this particular contract as so amended (even though the original was executed before the Act, and even if it were originally invalid) is binding.

There can be no good end achieved by pursuing this subject.

No judgment can, properly, be entered; the action is stayed. If either party so desire, the record may be indorsed with a declaration that the action is stayed by the legislation referred to.

The plaintiff appealed, and his appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ., on the 6th and 7th December, 1909.

E. F. B. Johnston, K.C., for the plaintiff, proposed to confine his argument to the validity of sec. 8 of the Hydro-Electric Power Commission Act of 1909, 9 Edw. VII. ch. 19 (O.), and to rely on his argument made in this case and *Beardmore v. City of Toronto*, 19 O.L.R. 139, upon an interlocutory application. [BOYD, C.:—Would it not be better to deal with the whole case, with the whole merits, now?] It may be; otherwise we must go back to Riddell, J., first, before we can argue the whole case on the merits. [BOYD, C.:—I think it is hard to isolate sec. 8 from all the rest of the legislation.] We say that the voters of the city of London had a right to pass upon this by-law, being a money by-law, under the general provisions of the Municipal Act. In

saying that, we must add that the by-law itself is *ultra vires*, being subject to the same defect as the statute, because it involves the engaging by the municipality in a business which it had no authority to engage in. I admit that the lighting of public buildings is a part of municipal business, but when we come to a by-law which relates entirely to private contracts and individual supplies of light and heat to private individuals, that is beyond the power of the Province and therefore beyond the power of the municipality. When the British North America Act was passed, "Municipal Institutions" had a well-defined meaning, and it was not intended that Provincial Legislatures, under cover of legislating as to these institutions, should legislate as to private purposes of trade and commerce. Water is a matter of public health, light is a matter of public protection. Provincial Legislatures have the right to deal with such matters, but there is a vast difference between legislating as to matters of public welfare like these and giving power to a city, not only to supply me with light, but to say that I must get it from the Hydro-Electric Commission. I contend that the moment you get a subject-matter which has in it any municipal element, an element which would be within the scope of Municipal Institutions, you have the widest legislative power; but when you deal with matters without any municipal element in them, it is otherwise. No doubt the Legislature can alter the form of the municipal body, but it has no power to create something out of Municipal Institutions which was not in existence or contemplation at the time of the British North America Act. The municipality can engage in Toronto in every business carried on there, and the Legislature can exclude every one else from engaging in such a business, if it can do what it assumes to do here. The by-law passed by the city of London was in a form apparently submitted to or approved of by the Hydro-Electric Commission, and it was voted on by the people. When the matter came before the Legislature it was determined that the matter of the by-law and the contract itself should be changed. [Counsel referred to a number of points of difference between the contract sanctioned by the by-law, and the legislative contract imposed by the Act, calling particular attention to the fact that the cost under the by-law as passed was not to exceed \$23.50 per horse power; while under the contract made by the Act of 1909 there is no limit; \$23.50 is called simply

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the "estimated" price.] How can the Legislature impose upon ratepayers the necessity of taking light and heat at a merely estimated amount? Was it ever contemplated by the framers of the British North America Act that the Provincial Legislatures should deal with matters on these lines? The Hydro-Electric Commission is not a private corporation in the same sense as the T. Eaton Co. or the King Edward Hotel Co. The Hydro-Electric Commission is an emanation from the Crown, and entitled to the protection of the Crown. This is what they claim. Provincial Legislatures have no right to destroy municipal institutions under cover of dealing with property and civil rights. They have no doubt a power to regulate them: *Bollander v. City of Ottawa* (1898-1900), 30 O.R. 7, 27 A.R. 335. *City of Toronto v. Virgo*, [1896] A.C. 88, at p. 93, shews that a power to regulate does not imply a power to prohibit.

J. M. McEvoy, on the same side. The plaintiff wants to restrain the city of London from mortgaging his property to carry out this Act. The plaintiff is not to be forced outside the provisions of the by-law he voted for. The subject matter of the whole of the legislation is electric current. Electric current is a commercial commodity, and as such is a subject of trade and commerce; and the whole body and frame of the legislation in question is an undue interference with trade and commerce, which is within the control of the Dominion Parliament. If this legislation is good—if the Provincial Legislature can say, "We will make a contract by which you must buy from a certain person for thirty years"—they can forbid any one to buy any commodity except from one vendor.

E. E. A. DuVernet, K.C., for the defendants. The electric power question has been dealt with by municipal councils and by legislatures, and this legislation was unanimously passed on the petition of the municipality. They come and ask not to be harassed by litigation, nor troubled by technical objections in giving effect to their will—the will of the people. It was never intended by the founders of Confederation that we should be in any lower position or on any lower footing than are the people of England. Case after case has come up in which vested rights have been overridden by Provincial Legislatures, but the legislation has been held to be *intra vires*. So in England they have gone much further than they did in former days. In *Conway v.*

Wade, [1908] 2 K.B. 844, [1909] A.C. 506, the Judges were very indignant, but could not refuse to give effect to the legislation. I also refer to *Hull Electric Co. v. Ottawa Electric Co.*, [1902] A.C. 237. We say that the legislation in question is *intra vires* under items 10, 13, 14, and 16, of sec. 92 of the British North America Act. Section 14 of the original Hydro-Electric Commission Act shews that it was not a fixed rate which was provided. I rely on the reasons given by Riddell, J., in the judgment in appeal.

A. H. F. Lefroy, K.C., on the same side. The plaintiff has in no way met the dilemma in which he is, that if the legislation in question is *ultra vires* of the Provincial Legislature, it must be *intra vires* of the Dominion. Nothing is better established than that under the British North America Act there is an exhaustive distribution of legislative power in relation to the internal affairs of Canada between the Provincial Legislatures and the Dominion Parliament: *Valin v. Langlois* (1879), 5 App. Cas. 115; *Citizens' Insurance Co. v. Parsons* (1881), 7 App. Cas. 96, at p. 109; *Russell v. The Queen* (1882), 7 App. Cas. 829, at p. 836; *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575, at p. 588. What part of this legislation, then, could the Dominion Parliament have enacted? It is submitted that they could not have enacted any of it. But, if the legislation is within the powers of the Provincial Legislature, those powers are plenary, and as full as the Imperial Parliament itself possessed or could bestow: *Hodge v. The Queen*, 9 App. Cas. 117, at p. 123; *Liquidators of Maritime Bank v. Receiver-General of New Brunswick*, [1892] A.C. 437, at p. 442; *Dobie v. Temporalities Board* (1881-2), 7 App. Cas. 136, at p. 146; *Attorney-General for Dominion of Canada v. Attorneys-General for Provinces of Ontario, Quebec, and Nova Scotia*, [1898] A. C. 701, at p. 713. The question then is, is this legislation with regard to the Hydro-Electric Commission within the provincial powers? Now, as to item 8 of sec. 92 of the British North America Act, relating to Municipal institutions in the Province, the argument that this legislative power is to be controlled in any way by what were understood as Municipal Institutions in the Province before Confederation has long since been disposed of: *Hodge v. The Queen*, *supra*, at p. 123; *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348, at p. 364; *Lefroy's Legislative Power in Canada*, pp. 57-61. The words, it is to be noted, are not that the Legis-

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lature may make laws in relation to "*the Municipal Institutions*" in the Province, but "*Municipal Institutions in the Province.*" Provincial Legislatures, under this provision, could, if in their wisdom they saw fit, abolish Municipal Institutions in the Province altogether. The Hydro-Electric Commission legislation, generally and as a whole, is authorised under two of the items of sec. 92, namely, first, under item 10 as legislation relating to a local work and undertaking other than the exceptions mentioned in that item. It is as much a local work and undertaking as a provincial railway: *Jones v. Canada Central R.W. Co.* (1881), 46 U.C.R. 250; or as a provincial navigation company whose operations are limited to the Province: *MacDougall v. Union Navigation Co.* (1877), 21 L.C.J. 63. The legislation is also justified under item 16 of sec. 92 as relating to a matter of "a merely local or private nature in the Province." The argument that a matter is not of a merely local or private nature because it concerns the whole Province, was long ago urged before the Privy Council and disposed of: *Lefroy's Legislative Power in Canada*, pp. 653-660; *Hodge v. The Queen*, *supra*; *Attorney-General for Ontario v. Attorney-General for the Dominion*, *supra*; *Attorney-General of Manitoba v. Manitoba License Holders' Association*, [1902] A.C. 73. The argument advanced as to electric current being a commercial commodity, and that therefore this legislation relating to it is an interference with the Dominion power under sec. 91 over the regulation of trade and commerce was advanced and overruled in *Hull Electric Co. v. Ottawa Electric Co.*, [1902] A.C. 237, at pp. 245-7. The proper construction of the words "the regulation of trade and commerce"—that they are to be understood as meaning political arrangements in regard to trade requiring the sanction of Parliament and regulation of trade in matters of international concern, and perhaps general regulation of trade affecting the whole Dominion, but not the power to regulate the contracts of a particular trade or business in a single Province—is pointed out by the Privy Council in *Citizens' Insurance Co. v. Parsons*, 7 App. Cas. at p. 112; see also cases collected in *Lefroy's Legislative Power in Canada*, pp. 550-562, especially p. 559, n. 3; and *Stark v. Schuster* (1904), 14 Man. L.R. 672. As to the objection that the Legislature cannot force a contract on people which they have not made, and interfere with vested rights as they have done in this legislation, it is too late to

urge that now. All this is included within item 13 of sec. 92, "Property and civil rights in the Province:" *Citizens' Insurance Co. v. Parsons*, 7 App. Cas. at p. 112; *L'Union St. Jacques de Montreal v. Bélisle* (1874), L.R. 6 P.C. 31; *Kelly v. Sullivan* (1875-1877), 2 P.E.I. 34, 1 S.C.R. 1; *Florence Mining Co. v. Cobalt Lake Mining Co.*, 18 O.L.R. 275. Moreover, sec. 8 of the Ontario Act of 1909, staying proceedings in this action, is also justified under this item 13, for "the right to bring an action is a civil right:" *per Moss, C.J.O.*, in *Florence Mining Co. v. Cobalt Lake Mining Co.*, at p. 292. Section 8 of the Act of 1909 is also justified by item 14 of sec. 92 as to "The Administration of Justice in the Province." It must be remembered that, as Burton, J.A., says, in *Regina v. St. Catharines Milling and Lumber Co.* (1886), 13 A.R. 148, at p. 165, the British North America Act "is to be interpreted in a broad, liberal, and quasi-political sense." It must also be remembered that that Act was establishing Legislatures for a great people, and, when it gave a Provincial Legislature power over the administration of Justice in the Province, there can be no doubt that it gave the Ontario Legislature the same power to close the Courts of Ontario to the people of Ontario, as the Parliament of Great Britain has to close the Courts of Great Britain to the people of Great Britain. The Ontario Legislature could, it is submitted, enact validly that the constitutionality of its statutes shall not be called in question in any of the Provincial Courts. But the founders of Confederation did not omit to provide methods of meeting such a condition of things, not only by the veto power of the Governor-General and by the establishment of additional Courts under sec. 101 of the British North America Act, but also by the at present undefined power of the Dominion Parliament to make laws for the peace, order, and good government of Canada relating to all matters not coming within the classes of subjects assigned exclusively to the Provincial Legislatures. The key to the whole matter, and to the British North America Act generally, is to be found in the first recital in the preamble of that Act, that the Provinces are to be federally united into one Dominion "with a constitution similar in principle to that of the United Kingdom." The people of the United Kingdom do not look to the Courts for protection against unjust or immoral legislation, but to the hustings and the polls, and to their votes as independent electors. The founders of Confederation in-

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tended that the people of Canada should have a political freedom as broad and ample as is enjoyed by the people of the United Kingdom, and that they should be induced, or, in fact, compelled, by the very freedom which their legislatures enjoy, to attain to an activity of public life equal to that of the great people from whom they are sprung.

J. R. Cartwright, K.C., for the Attorney-General for Ontario. *L'Union St. Jacques de Montreal v. Bélisle*, *supra*, at pp. 36-7, shews that if a matter comes under item 16 of sec. 92, the onus is on those who attack the legislation to shew that it comes under sec. 91. That the legislation in question does not fall within "Trade and Commerce," as used in sec. 91, is clear from the language of the Privy Council in *Bank of Toronto v. Lambe*, *supra*, at p. 575. *Severn v. The Queen* (1878), 2 S.C.R. 70, was also referred to; and on the general powers of the Province *Liquidators of Maritime Bank v. Receiver-General of New Brunswick*, [1892] A.C. 437, at pp. 441-2.

Johnston, in reply. Private business is outside municipal functions. The Legislature cannot give these private functions to a municipal body. The municipal body cannot as such engage in the business of private lighting. We say that, properly construed, the legislation does not give the municipalities the power to go into the business of private lighting, but, if it does, it is *ultra vires*: *London County Council v. Attorney-General*, [1902] A.C. 165, *per* Lord Halsbury, at p. 167. We are not concerned here with a local work and undertaking under item 10 of sec. 92. Such local works and undertakings must be of the same kind as those excluded in that sub-section. [MAGEE, J.:—Does not the wording of that sub-section shew that any local works and undertakings which do not extend beyond the Province are in the power of the Provincial Legislature?] Yes, if of the same kind as those excluded, but not otherwise. As to sec. 8 of the Act of 1909, it was not passed under item 13 of sec. 92, but as the complement of the Hydro-Electric Commission legislation. It is quite a different thing to say that all actions shall be brought within a limited time, and to say that no action shall be brought at all. As to the *Florence* case, what was decided there was only that the property in question was the property of the Crown, and that the Crown could deal with its own property as it saw fit. Section 92 of the British North

America Act implies the continuance of the matters mentioned in it. It gives power to make laws in relation—not to the subjects—but to matters coming within the classes of subjects. The Legislature cannot do in part what they cannot do altogether. If they could take the farm of A. and give it to B., they could take all the farms in the Province and give them to B.

December 16. The judgment of the Court was delivered by BOYD, C.:—This action in substance attacks the validity of several provincial statutes: 6 Edw. VII. ch. 15, an Act as to electrical power; 7 Edw. VII. ch. 19, superseding the former, except as to contracts already entered into; 8 Edw. VII. ch. 22 and 9 Edw. VII. ch. 19, both providing for the validation of by-laws and contracts made under the former Acts.

In statement the action seeks to annul the contract entered into by the city of London with the Hydro-Electric Power Commission as authorised, amended, and validated by this legislation. The Commission is not a party because the Attorney-General refused his consent to its being added under sec. 23 of the Act of 1907. But the action is carried on against the corporation of London to test the constitutional question raised under the British North America Act, 1867. The scheme of the first and main Act, so far as pertains to the municipalization of electrical power, may be thus briefly expressed: A corporate body is created under the name of the "Hydro-Electric Power Commission," empowered to acquire all lands, water privileges, and plant needful for the generation, development, and transmission of electrical power in the Province. To this body or Commission municipal corporations may apply for the transmission of electricity for the uses of the corporation and its inhabitants in regard to lighting, heating, and motive-power. Thereupon the Commission furnishes estimates of the cost, plans, and specifications of the works necessary for the distribution of electricity by the corporation; a statement of the terms and conditions upon which the energy may be transmitted and supplied, together with a form of contract to be entered into: 6 Edw. VII. ch. 15. The council of the corporation may then submit to the electors a by-law authorising the municipality to enter into such contract, and, if the majority of electors assent thereto, the contract may be executed by the Commission and the corporation.

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In the city of London application was made to the Commission, and certain steps were taken which resulted in a large electoral vote of nearly two to one in favour of the by-law (4th January, 1907). It is said, and not gainsaid, that the general plan of the work then contemplated and voted on was that the Commission should undertake the financial responsibility of transmitting the power to London and supplying it at a given price in the municipality. In taking the vote the form of contract and the estimates were not submitted to the electors. So that legislative confirmation was invoked, and it was granted with, it is said, certain changes in the groundwork. It was said, and not gainsaid, that one change reversed the original plan by providing for the delivery at Niagara Falls—the point of development as contrasted with the point of supply—and so altering materially the whole financial responsibility. The contract, and in effect the by-law, were made valid in this form without being further voted upon. It would appear that both by-law and contract would be open to successful attack in the Courts but for their legislative validation by 7 Edw. VII. ch. 73, sec. 2; 8 Edw. VII. ch. 22, sec. 4; and 9 Edw. VII. ch. 19, sec. 4. In the schedule to this legislation appears for the first time the contract which was executed by the defendants and the Commission. The legislative change was made in April, 1908; the contract signed on the 9th June; and this action begun on the 16th June of that year. The final piece of legislation recited that doubts had been raised as to the validity and binding character of the contract, and that the councils who had executed the contracts were desirous that the enjoyment of the benefits of the undertaking should not be postponed by unnecessary and vexatious litigation. It then enacts that the contract as varied shall be valid and binding according to the terms thereof, and shall not be called in question on any ground whatever in any Court, but shall be held and adjudged to be valid and binding on the corporation—which shall be conclusively deemed to have entered into a contract with the Commission, within the meaning of the statutes. And by sec. 8 every action theretofore brought and then pending wherein the validity of the contract or by-law is attacked, by whomsoever brought, shall be forever stayed. The Act was passed on the 29th March, 1909, and is levelled at this particular action and any other then pending.

The legislation contained in this series of Acts is questioned in this appeal on the special ground that it is *ultra* the provincial law-making power. And in this aspect I take it that it is open to the Court, notwithstanding the wide language used as to staying the proceedings, to take cognizance of the legislative competence to deal with the whole subject-matter. If the provisions of the statutes in question were found to be beyond the powers of the Provincial Legislature, it is the duty of the Court, under the scheme of the British North America Act, 1867, so to adjudicate and determine. The controversy was presented under many aspects, but the solid residuum of objection left at the close of the argument is within a narrow compass. It may be thus put: Electric current is a commodity, and as such the subject of "trade and commerce;" this is an attempt to engage in municipal trade; and the law, rightly construed, does not permit a municipal body to interfere with the rights of individual inhabitants as to private lighting. Something also was suggested as to the undertaking savouring of monopoly and claiming exclusive rights, unfavourable to free trade and self-government. It was urged also that the electors, even by unanimous vote, could not warrant such legislation. It is admitted (perhaps reluctantly) that, so far as regards supplying light to public buildings and streets and the like, the legislation was permissible. No doubt, the statute contemplates that light, heat, and power may be supplied (at a proper charge) to individual inhabitants and families. And the evidence is that the defendant corporation intends to go into this line of business. A clause in the contract provides that the corporation will take power exclusively from the Commission during the continuance of the agreement; and the extreme limit assigned is forty years unless determined as provided in the contract. In regard to exclusive rights and private supply, there appears to be nothing further that is relevant in the statutes, by-law, and contract.

In considering all legislation in Canada and the Provinces touching its constitutional aspect, the question is not of policy or expediency or reasonableness, but simply of competence, *i.e.*, whether the particular statute can be brought into or under the class of subjects assigned by the Imperial Act of Confederation to the enacting assembly, whether it be Legislature or Parliament.

These Acts upon their face, by their very titles, claim to be

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classified under the heading of "Municipal Institutions in the Province:" British North America Act, 1867, sec. 92 (8). The main Act is intituled "to provide for the Transmission of Electrical Power to Municipalities," 6 Edw. VII. ch. 15; and the next one, to validate by-laws and contracts made under the former. They are all *in pari materiâ*. They deal with the transmission of electricity from Niagara Falls through and to various municipalities, making it available for all municipal corporations who apply. The installation of electric plant in the city of London would be *per se* "a local work or undertaking," "a matter merely of local or private nature in the Province:" *ib.* sec. 92, Nos. 10 and 16. Such legislation in England always falls under the heading of "Local Acts."

The "establishment of municipal institutions for the whole country" was recommended by Lord Durham's report of 1839, and the term "Municipal Institutions" passed into statutory language and significance in 1858: 22 Vict., 1st sess., ch. 99, "An Act respecting the Municipal Institutions of Upper Canada;" and thence it is carried into the C.S.U.C. 1859, ch. 54, which practically codified the municipal law of the Province as it then was and as it continued to be till the date of Confederation in 1867. The term "Municipal Institutions" appears intended to give compendious expression to the state of affairs which exists in a defined populated area, the inhabitants of which are incorporated and intrusted with privileges of local self-government or administration responsive to the needs, the health, the safety, the comfort, and the orderly government of an organised community. As put by Lord Herschell in "The Liquor Prohibition Appeal of 1895,"* when speaking of its use in the British North America Act, " 'Municipal Institutions' deals with two things, the constitution of municipalities or municipal bodies and their functions" (argument at p. 35). Having created the municipality, the Province is able to confer upon that body any or every power which the Province itself possesses under the Confederation Act. In the same case Lord Watson expresses the opinion: "The Province might give the local body new powers and functions so long as these were powers and functions which the Legislature of the Province could exercise and legislate upon, and

* Bound volume in the Library of the Law Society of Upper Canada. See also *S.C.*, *sub nom.* *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348.

could therefore delegate to a municipal body:" *ib.* p. 44. These powers, he says again (p. 45), are to be administered for the benefit of the public and the inhabitants of the municipality. In the same case, at p. 51, this is to be found: Lord Davey: "I suppose you would say that 'Municipal Institutions' . . . would include, for instance, the creation of a market and municipal police."

. . . Lord Watson: "Or a separate body of commissioners for the purpose of supplying the locality with water; I should say all these were Municipal Institutions . . . or institutions created for the benefit of the particular municipality." Lord Davey: "And I should suppose it might include the establishing a gas works." Lord Herschell: "I should think it included every local body and every power that you can confer upon that local body:" *ib.*, pp. 51, 52. Lord Morris suggests, at pp. 54, 55, that the enacting part of sec. 92 (8) should be read in this way: "In each Province the Legislature may exclusively make laws in relation to matters coming within Municipal Institutions in the Province." And Lord Herschell considers that "Municipal Institutions" refers not so much to the powers or functions as to the corporate body upon which the power or function is bestowed: p. 54.

Be that as it may, it is pertinent to look at the Municipal Institutions Act existing at Confederation to see what subjects and powers were embraced in it or conferred by it. In particular we find that before Confederation municipal bodies were empowered to supply gas and water for public and also for private use and consumption: 29 & 30 Vict. ch. 51 (1866), secs. 2, 3, and 4 of which give to the municipality the same powers as are possessed by private joint stock companies incorporated under C.S.C. 1859, ch. 65, for supplying cities, towns, and villages with gas and water. Section 65 shews that the gas and water is to be supplied to private persons. When it is remembered that gas is available for heat and motive power, as well as for light, it is an easy step to say that it is equally right and proper to supply the new commodity, electricity, for purposes of light, heat, and power to the municipality and its inhabitants. The statute in hand then purports to confer a new power upon municipalities, and that power relates to the management and administration of a local undertaking, *i.e.*, the transmission of electrical energy for the common good of the inhabitants, in its public and private use.

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The provincial legislation in its course and development has been akin to that on the subject of lighting in England. The supply of gas by private companies preceded the manufacture and supply of gas for general use by municipal bodies. We are told by Mr. Clifford that Parliament has repeatedly refused to allow even municipal bodies to supply gas in competition with existing gas companies, and has always stipulated that if corporations want such a power they must buy the gas works: *History of Private Bill Legislation*, vol. 1, p. 232 *n.* (1885).

And when electricity began to come to the front, the course of procedure was the same in regard to electric lighting companies: first the private company and then the option to purchase given to the municipal body. The English Electric Lighting Act of 1882 gives power to local authorities to supply light by license under a special Act (this for private as well as public purposes), and the expenses are to be defrayed out of local rates (secs. 7, 8, and 27). I may quote a summary of the situation in the mother country from Lord Courtney's book on the Working Constitution of the United Kingdom (1890). He says: "Among the other duties of borough councils is that of seeing that the communities are adequately supplied with lighting and water. Gas and water works were, however, in most cases originally undertaken by private companies under local Acts of Parliament, and are, indeed, in many cases still so promoted. Newer systems of electric lighting have often, perhaps generally, been started under licenses from local authorities for a term of years. Most of the larger boroughs have, however, taken over and extended the gas and water works supplying their areas, and some have started electric lighting. There is a clear tendency on the part of municipalities to undertake these functions for themselves, applying at least some of the profits that may be realised in diminution of rates:" p. 242. He then speaks of tramways, and concludes: "These are examples of a process known as the extension of municipal trading, the policy of which is still in dispute:" p. 243. He says further: "There are signs that the provision of electric power may in appropriate places come within the range of municipal enterprise. One ground of objection to the movement is found in the apprehension that popularly elected bodies may work these undertakings in the interest of working men voters rather than on commercial princi-

ples; but so far it cannot be said that experience has proved this danger to be substantial:" p. 243.

Though thus referred to as municipal trading, the supply of light, whether by gas or other illuminant, is a proper function of municipal administration. So to hold does not at all infringe upon the meaning of "Trade and Commerce," as used in the British North America Act, where exclusive power is conferred upon the Dominion to legislate as to the regulation of trade and commerce (sec. 91 (2)). These words would point to political arrangements in regard to trade, requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and the like, as indicated in *Citizens' Insurance Co. v. Parsons*, 7 App. Cas. 96, 110; but the comment of Lord Herschell on that case, in "The Liquor Prohibition Appeal of 1895," was that it "allowed to the Provincial Legislature a very considerable power of dealing with trade within its own limits—within its own borders:" p. 115. And he says again at p. 104: "You may give a very broad construction to "Trade and Commerce," and yet it may be that it would still leave open a very large power of dealing in such a way as to incidentally affect trade without its being a part of the regulations made within such meaning."

It appears to me that the Privy Council has passed upon this very point in reference to the provincial regulation of electric light and power in *Hull Electric Co. v. Ottawa Electric Co.*, [1902] A.C. 237. A Quebec statute legalised a contract made by a municipal council for procuring a supply of electricity for light, heat, and motive power, for thirty-five years, for the use of the municipality and its inhabitants. The validity of that legislation was attacked on much the same grounds as are advanced here, viz., that electric light was a commercial commodity and as such fell within the exclusive competence of the Dominion Parliament to regulate trade, and that a monopoly had been created beyond the municipal power. These points were in controversy in the Courts below, in the first or primary Court, then in review in the Superior Court, and lastly in the Court of Queen's Bench, with varied successes and reverses. But when it came before the Judicial Committee the attack upon the by-law and the statute was abandoned. Upon this abandonment Lord Macnaghten, giving the judgment of the Privy Council, said: "It is obviously untenable. The scheme in favour of which

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the by-law was passed was a purely local undertaking. As such it came within the exclusive jurisdiction of the Provincial Legislature, and not the less so because in such cases it is usual and probably essential for the success of the undertaking to exclude for a limited time the competition of rival dealers:" p. 247. That decision, though on a Quebec statute, is of equal force as to Ontario—the municipal system in both Provinces being organised and developed on the same lines.

Whether or not the distribution of electricity to private persons at a fixed price can fairly be called "trading," it is not needful to consider. Neither is it in place to consider what forms of municipal trading or industrial undertakings should be encouraged by the Legislature or what forbidden. Nor on what terms the permission should be granted. All such matters of discretion or expedience or advantage rest with the law-making body, and are subject to the exercise of its plenary power.

But it is perhaps well to deal with the proposition advanced that the supply of house-light is a purely private matter, and that no public body can interfere with the right of a man to use any kind of light he pleases, and that there is no right to tax him for the supply of special light to other people. No doubt, this scheme for electrical light contemplates local taxation to defray the expenses of instalment and operation—though it is hoped that after a while the undertaking will carry itself, will defray the initial cost, and, it may be, yield a surplus for the general benefit of the inhabitants. The term of forty years for the subsistence of the contract is fixed between the Commission and the corporation, so that full opportunity may be given to work out beneficial and profitable results to both parties. I note in the English Electric Lighting Act of 1888 a period of forty years is given for the operation of a private undertaking before compulsory purchase can be enforced by the local authority.

Taxation of a given locality to meet the expense of a business undertaking in that place should only be imposed if it is for the general benefit of the community. To install or support a private trade or business has not been considered as of municipal cognizance to be undertaken by the municipality. It is to be left to private enterprise. In the present development of economic utilities, it may become a question of kind and degree and availableness

whether or not the promotion of the interests of the large aggregation of the inhabitants constitutes a public service or not. In regard to electric light from Niagara Falls, these considerations enter into the question: the individual cannot procure his own supply of electricity; it has to come to him by means of material conveyance over private and public property—streets and highways—which cannot be used without a right of franchise or expropriation. The transmission and storing and distribution of electrical energy necessitate a system of control and regulation for the interests of public and private safety. If economic and convenient use of electricity is to be obtained, these desiderata exclude the undertaking from the area of private enterprise and an ordinary business. It is removed within the range of Municipal Institutions. The proper user and enjoyment of such a service affects the citizens as a community and not merely as individuals. The self-interest of the few must give way to the common interests of the whole body of incorporated inhabitants represented by the vote of the majority. The general proposition as in effect expressed by the Massachusetts Bench may be adopted as a good working rule on this head, viz., that matters which concern the welfare and convenience of all the inhabitants of a city or town and cannot be successfully dealt with apart from the aid of powers and privileges derived from the Legislature, may be subjected to municipal control when the benefits received are such that each inhabitant needs them or may need them and may participate in them, and it is for the interest of each inhabitant that others as well as himself should possess and enjoy them. See opinion of the Justices to the House of Representatives, 150 Mass. at p. 597 (1890).

The supply of light by means of gas or electricity, with the incidental advantages of heat and motive power connected therewith, appear to be a proper municipal function. The primary need, no doubt, is as to public places (streets and buildings, etc.); yet the vending of the commodity to private consumers is a convenient and comparatively inexpensive accompaniment. Both go far to promote the convenience, comfort, and safety of all members of the municipality.

I have no difficulty in deciding that as to the main and central question here agitated, as to the power of the City of London to engage in the business of acquiring and distributing electric energy,

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that it is one of the incidents of municipal government, whether or not in competition with private concerns is of no material significance in the constitutional aspect of this legislation.

The Provincial Legislature has power to establish electrical works as a local work or undertaking under another clause of the Confederation Act, sec. 92 (10). Consequently, it has power to delegate this undertaking to a competent municipal body.

The next questions may be considered together, and may be thus stated: has the plaintiff, as a ratepayer of the city, a right to be heard in seeking relief after the validation of the contract and by-law? He starts with a good cause of action. The terms of the contract being changed after the vote, *primâ facie* the vote has been cast away, and there is no valid contract which binds the ratepayers, and the levy of rates based on contract and by-law is illegal. But comes the special Act as the *deus ex machinâ*, with double aspect, not only to validate everything but to close the Court against the aggrieved ratepayer.

Now, the Legislature might have passed an Act to provide directly for the instalment of this electric plant and for the levy of rates upon the inhabitants for the outlay and the maintenance. There is no constitutional reason why the Legislature might not resume part of the matter or proceeding delegated, and take it out of the hands of the municipality, if it thought proper: assuming that a majority vote was passed in favour of the project, and that the changes made in the contract were not of fundamental character or such as affected the proper realisation of the scheme, and that the expense and delay of a further vote would not be likely materially to change the opinion of the ratepayers: such considerations as these might, well or ill founded, induce the body of legislators, containing representatives of the city, to apply the drastic remedy now resented by the minority. It must also be noted that the mayor and council of the city authorised and approved of the execution of the contract so validated on that further popular vote. And the mayor and council are the legally constituted representatives of the inhabitants, and are responsible to them at the polls.

However, the Legislature, instead of letting the people vote again on the changed by-law, have in effect assumed or declared that no vote is necessary, and (that being so) no Court can change

the situation. This legislative action is, no doubt, a violation *pro tanto* of the principle of local self-control, and is somewhat of a reversion to an older type of paternal or autocratic rule. But, whatever be its character or effect, the investigation is not for the Courts, but for the politician or the elector. The propriety of any interference with these rights of local self-government is a matter of legislative policy and ethics—not of constitutional law. Where the Legislature has transcended its power, the Courts may sit in judgment on the statute: where legislative power within its proper ambit is regarded as unreasonable or abused, it is open for the Dominion to exercise the right of disallowance. The principle which is now fairly rooted in English law as to Acts of Parliament applies with equal force to Acts of Provincial Legislatures acting within the constitutional powers conferred upon them by the Imperial statute of 1867—the British North America Act. When the Provincial Legislature exercises exclusive plenary power within the constitutional limits of the Imperial Federation Act, any statute so enacted is not to be revised or supervised by the judicial body.

Blackstone deals with the large proposition that Acts of Parliament contrary to reason are void. But (he says) if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it, and the examples usually alleged in support of this sense of the rule do none of them prove that when the main object of the statute is unreasonable the Judges are at liberty to reject it: for that were to set the judicial power above that of the Legislature, which would be subversive of all government: Com., p. 91. And in Mr. Christian's note (it is added): "If an Act of Parliament is clearly and unequivocally expressed, it is neither void in its direct nor collateral consequences, however absurd and unreasonable they may appear. . . . When the signification of a statute is manifest, no authority less than that of Parliament can restrain its operation."

Beyond the commentators, the same thing was judicially expressed by Lord Campbell in *Logan v. Burslem* (1842), 4 Moore P.C. 284, 296: "As to . . . an Act of Parliament not binding if it is contrary to reason, that can receive no countenance from any Court of Justice whatever. A Court of Justice cannot set

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itself above the Legislature. . . . It is a question of construction (as to the meaning of the Act), and there is no power of dispensation from the words used." This case, decided in a Vice-Admiralty appeal from Sierra Leone in 1842, was probably not seen by Robinson, C.J., when he used the language in 1848 which is found in *Toronto and Lake Huron R.R. Co. v. Crookshank* (1848), 4 U.C.R. 309, 317. He adverts "to the law that even, in a case where the Legislature of the Province have powers which are not controlled expressly by a higher authority than their own, it may yet be confined by some clear and undisputed constitutional principle." And at p. 318 he refers to the few instances in which Acts might be supposed to be passed so utterly at variance with natural justice and the inherent rights of individuals that Courts of Justice could refuse to treat them as binding.

The mistiness of view as to possible grounds on which an Act of Parliament might be avoided by the Courts has been cleared away by the modern doctrine as to the Sovereign power resident in the Legislature, and I do not know of any example, even in early days, when a concrete case arose of an Act of Parliament being overruled or displaced by the Judges.

I may revert to the modern view as laid down by Judges and in judgments of the highest authority. Lord Halsbury says: "It is not competent to any Court to proceed upon the assumption that the Legislature has made a mistake. Whatever the real fact may be, I think a Court of law is bound to proceed upon the assumption that the Legislature is an ideal person that does not make mistakes:" *Commissioners for Special Purposes of Income Tax v. Pemsel*, [1891] A.C. 531, at p. 549. And again it is said: "Where the . . . sense of the language is unambiguous . . . the sense must prevail; we must take the law as we find it; and, if it be unjust or inconvenient, we must leave it to the constitutional authority to amend it:" *per Coleridge, J.*, advising the Lords in *Garland v. Carlisle* (1837), 4 Cl. & F. 693, 705, 706. And finally in a Canadian appeal, *Labrador Co. v. The Queen*, [1893] A.C. 104, 123, Lord Hannen summed up the situation tersely thus: "The Courts of law cannot sit in judgment on the Legislature, but must obey and give effect to its determination."

The power to stay actions by direct intervention of the Legislature is but rarely exercised. The usual precedents are drawn

from the region of martial law. It is a far call from high political offenders to the ratepayer who objects to a civic burden as irregularly imposed.

There is no analogy to be drawn from legislation as to limitation of actions. These usually give a certain period of time in which to assert rights in the Courts, under penalty of being shut out from relief. Such a statute is one of repose—this, however, is one of repression. If litigation is to be barred because it is regarded as frivolous or vexatious, the well-recognised plan is to leave it in the hands of the Judges, as, *e.g.*, is provided in the English Vexatious Actions Act of 1896, by which the Attorney-General can apply for an order that no legal proceedings shall be instituted by one who has habitually and persistently instituted vexatious legal proceedings without any reasonable ground. In the United States a vested right of action is treated as a piece of property which is to be protected by the Courts against all arbitrary interference, even on the part of the Legislature.

As to the peremptory stay of a pending or a vested cause of action, there is a salient distinction between American and English methods and law. Kent, C., said in *Dash v. Van Kleeck* (1811), 7 Johns. 477, 505: "There is no distinction in principle . . . between a law punishing a person criminally, for a past innocent act, or punishing him civilly by divesting him of a lawfully acquired right." American jurists distinguish between judicial and legislative acts thus, that a judicial act determines what existing law is in respect to some existing thing already done or happened; while a legislative act is a pre-determination of what the law shall be for regulation of all future cases falling under its provision. A retroactive law to stay a plenary action is not regarded as a legislative act. In *Ervine's Appeal* (1851), 16 Pa. St. 256, 266, it is said, "That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced."

But with this limitation of the law-making power English opinion does not agree, though the ordinary use of such power is deprecated. The present stay of proceedings does not so much matter, as the whole ground of attack has been taken away by the legalisation of the by-law-contract foundation of the whole undertaking. Approach to the judgment seat being barred, it

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is of slight importance whether the outer door of the Courts is open or closed.

Respecting the section of the statute which stays the actions pending, it is plainly enough expressed to that effect, and the only comment that the Court can make is to quote these words from Lord Watson's judgment in *Young v. Adams*, [1898] A.C. 469, 476: "A retrospective operation ought not to be given to the statute, unless the intention of the Legislature that it should be so construed is expressed in plain and unambiguous language, because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment. The ratio is equally apparent when a new enactment is said to convert an act wrongfully done at the time into a legal act, and to deprive the person injured of the remedy which the law then gave him."

The short result is that no ground of interference appears, and that the legislation is within provincial competence. There may be a declaration to this effect, but no further order. It is not a case for costs.

[DIVISIONAL COURT.]

BEARDMORE V. CITY OF TORONTO.

Constitutional Law—Powers of Provincial Legislature—Authorising Municipal Corporations to Acquire and Distribute Electric Energy—B.N.A. Act, sec. 92 (8), (10)—Validation of Contracts with Hydro-Electric Power Commission—Stay of Pending Actions—Right of Court to Inquire into Validity of Statutes.

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In an action similar to *Smith v. City of London*, ante 133, the decision in that case was followed, and a declaration made that the statutes in question in both actions were *intra vires* of the Ontario Legislature.
Held, that the single point of difference, in that there was an existing electric light company in Toronto, was not a material difference.

ACTION by Walter D. Beardmore, a freeholder and ratepayer of the city of Toronto, suing on behalf of himself and all other ratepayers, against the city corporation, for a declaration that a certain contract made between the defendants and the Hydro-Electric Power Commission of Ontario was void, and for an injunction restraining the defendants from acting upon the contract.

The pleadings are fully stated in the report of the same case, 19 O.L.R. 139, upon a motion to strike out the statement of claim. See also the report of *Smith v. City of London*, ante.

The action was tried before BOYD, C., without a jury, at Toronto, on the 16th November, 1909.

E. F. B. Johnston, K.C., and *H. O'Brien*, K.C., for the plaintiff.
H. L. Drayton, K.C., and *H. Howitt*, for the defendants.
J. R. Cartwright, K.C., for the Attorney-General for Ontario.

December 16. BOYD, C.:—This litigation has arisen out of a dispute as to the best method of lighting the streets and houses of the city of Toronto. Owing to recent discoveries, the ability to transmit electrical currents over long distances, with efficient and economic results, has been demonstrated. Thereupon public attention has been drawn to the feasibility and desirability of distributing supplies of light and heat and power generated at Niagara Falls and elsewhere for municipal use, as a measure of public utility. The city could not undertake this task, to draw electrical force from the Niagara river, without legislative assistance, as the operations had to be conducted outside of the city limits and in various intermediate municipalities, but the need of any special statute was

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obviated by the general Act 6 Edw. VII. ch. 15 (O.), which extends to any municipal corporation. Section 7 of this Act provides that the council of the corporation may submit to the electors a by-law authorising the corporation to enter into a contract with the Hydro-Electric Power Commission, and, in case the by-law receives the assent of the majority of electors voting thereon, such contract may be entered into and executed, etc. As the contract involved a heavy financial burden for many years, it was essential, according to our municipal institutions, that it should be accepted by the vote of the local electorate as a necessary preliminary. Accordingly a form of contract was prepared of the 4th May, 1908, between the Hydro-Electric Power Commission and the Corporations of Toronto and of other municipalities, of the second part, setting forth the terms of the proposed undertaking, and, this being submitted to the people on the 1st January, 1907, was carried. So the city was committed to the proposed scheme as set forth in the terms voted upon—assuming a fair and unchallenged election to have taken place.

The by-law, as voted on, stipulated for a supply of electric power and energy for lighting, heat, and power purposes at from \$14 to \$18 per horse power per year for continuous power ready to be distributed by the corporation, and that such price should include all charges for interest, sinking fund, for the cost to construct and the cost to operate, maintain, repair, renew, and insure the plant, machinery, and appliances.

As actually executed the contract varied in material respects from the by-law, and particularly in two matters: (1) the contract provides for power at a price per horse power at Niagara Falls; and (2) in addition that the city is to pay (a) interest at 4 per cent. upon the moneys expended by the Commission, (b) an annual sum for the proportionate part of the cost of the construction of the line, etc., and (c) bear its proportionate part of line-loss and its proportionate part of the cost to operate, maintain, repair, renew, and insure the line.

The law is that when a matter has been voted on by the people (*i.e.*, the qualified electors) the majority shall prevail. Where a given contract is approved of by public vote, it is to be carried out according to its very terms, and not by any system of alleged or assumed equivalents. The terms of the contract here executed and

operative are materially different from those submitted to the electorate, and, did the matter so rest, the intervention of the Court to stay proceedings, or in order to provide for the submission of the changed proposition to another vote, might well be sought. But at this point special legislative intervention appears in the statute of 8 Edw. VII. ch. 22, by which the by-law in question is declared to be in form and substance sufficient compliance with the requirements of the former Act and the by-law is confirmed and declared to be sufficient, legal, valid, and binding for the purposes thereof (sec. 1). This was followed by another confirmatory Act of retrospective power in 9 Edw. VII. ch. 19, in which it was enacted that the validity of the varied contract should not be open to question and should not be called in question on any ground whatever in any Court, but should be held to be binding on all the corporations (including this city). And further, by sec. 8, every pending action attacking or questioning the validity of the by-law or of the contract, or questioning the jurisdiction or power to do what has been done, was perpetually stayed, by whomsoever such action was brought (which includes this action).

The Court so far invaded these provisions as to entertain the action in order to have the point of legislative competence discussed and determined. The terms of the statute cannot inhibit the examination of that question.

These statutes purport to be passed in pursuance of the right to legislate as to "Municipal Institutions" in the Province: British North America Act, 1867, sec. 92 (8). That gives the right to create a legal body for the management of municipal affairs (as said by Lord Watson in *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348, 364). And by necessary consequence that implies a right to define what duties and what range of subjects shall be intrusted or delegated for regulation and control to the local subordinate body. It is open, therefore, for the proper understanding of the constitution to regard what had been done under Provincial law before and after the establishment of the Federal Government of Canada.

In this Province the rudiments of local municipal government appear in legislation providing for the election of parish or town officers in 1793. In 1832 Brockville was the first town where a board of "police" was incorporated. That word "police" was used

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in its primary sense as meaning the regulation of a locality with reference to the maintenance of order, the prevention of offences, and the enforcement of laws touching the health, safety, and comfort of the inhabitants. Many special charters of like kind followed to other considerable centres of population. And in 1834 the now familiar term of "municipal government" was used in reference to the town of York, the name of which was then changed to Toronto. By statute of the Province the inhabitants were incorporated. The preamble set forth that, on account of the increase of population, commerce, and wealth, a more efficient system of police and municipal government had become necessary and that power should be given to elect a mayor, aldermen, and common councilmen and other officers for the management of the city and the levying of such moderate taxes as may be found necessary for improvement and other public purposes.

In 1841 Upper and Lower Canada were united by Imperial Act 3 & 4 Vict. ch. 35, and by sec. 58 the Governor was empowered to constitute townships in those parts of Canada not so constituted and to provide for the election and appointment of township officers after the existing model of townships in Upper Canada. The Canadian Act of 1841 provided for the better internal government of Upper Canada by the establishment of local or municipal authorities therein.

In 1849 the municipal system took its present form, and became comprehensive of all parts of the Province. It was declared to be of great public benefit and advantage that provision be made by one general law for the erection of municipal corporations and the establishment of regulations of police in and for the several counties, cities, towns, townships, and villages of Upper Canada (12 Vict. ch. 81). In short, it may be said that the law regarding the Municipal Institutions of this Province had received a stable form and body prior to Confederation, and it does not seem necessary to follow the matter in more detail in the present judgment. This I have endeavoured to do in the *Smith v. City of London* case, which was argued before I had fully considered my judgment in this case. I have said so much as to the introductory facts and circumstances to shew that at a certain stage this litigation is identical with that in the *City of London* case.

I cannot distinguish the legal and constitutional aspects of the

questions submitted for adjudication in each case; they are identical; and for this reason I forbear to labour the details further. I would be bound by the decision of the Divisional Court in the *London* case, and I am willing to adopt the conclusion there arrived at without further elaboration.

The single point of difference, in that there is an existing electric light company in Toronto, is not a material difference. Whether with or without competition, the object of the Legislature and of the city authorities must be to secure an adequate supply of electric service for the needs of all at a fair and reasonable rate of compensation. This point as to competition is dealt with in a controversy not unlike the present by Mr. Justice Shiras in the Federal Court of the United States in *Thompson Houston Electric Co. v. City of Newton* (1890), 42 Fed. R. 723.

The judgment will be in the same terms as in *Smith v. City of London*.

January 25, 1910. This judgment was affirmed by a Divisional Court (MULOCK, C.J. Ex.D., MAGEE and SUTHERLAND, JJ.), following *Smith v. City of London*, ante 133.

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MACKENZIE V. MAPLE MOUNTAIN MINING CO.

Company—Services of President—Remuneration—General By-law—Confirmation by Shareholders—Resolution Fixing Amount—Ontario Companies Act, sec. 88.

Section 88 of the Ontario Companies Act, 7 Edw. VII. ch. 34, provides that "no by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting:"—

Held, that this means that a by-law for the remuneration of directors shall first be passed by the board of directors, and then laid before a general meeting and passed upon by the body of shareholders.

The provisional directors of a company adopted a by-law providing that the president, vice-president, and directors should receive such remuneration for their services as might by resolution of the board be determined, and no further by-law or confirmation by the shareholders, other than the confirmation of this general by-law, should be necessary to provide for such remuneration. At a general meeting of the shareholders this and the other by-laws adopted by the provisional directors were confirmed by resolution; at a subsequent meeting of the shareholders a resolution that a salary of \$100 a month be paid to the president was carried; and at a meeting of the directors held thereafter a motion to the same effect was carried:—

Held, BRITTON, J., dissenting, that the statute had not been complied with, and the president was not entitled to the salary voted.

Beaudry v. Read (1907), 10 O.W.R. 622, approved.

Judgment of CLUTE, J., affirmed.

ACTION to recover \$525 alleged to be due to the plaintiff by the defendants for the plaintiff's services as president of the company from the 7th September, 1907, to the 12th February, 1908, at the rate of \$100 per month. The provisional directors of the company prepared by-laws for the company, and presented their report of those by-laws at the first meeting of the company. One clause of the by-laws was: "The president, vice-president, and directors shall receive such remuneration for their services as may by resolution of the board be determined, and no further by-law or confirmation by the shareholders, other than the confirmation of this general by-law, shall be necessary to provide for such remuneration."

The by-laws came before the meeting of the shareholders, and were confirmed. The shareholders subsequently passed a resolution to pay the president \$100 a month. This was confirmed by the directors.

The action was tried before CLUTE, J., without a jury, and dismissed without costs, on the 26th May, 1909.

The plaintiff appealed, and his appeal was heard on the 3rd November, 1909, by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND, JJ.

J. W. Bain,¹ K.C., for the plaintiff. There was a compliance with the Ontario Companies Act, 7 Edw. VII. ch. 34, sec. 88,* and the statute in general. *Beaudry v. Read* (1907), 10 O.W.R. 622, and *Birney v. Toronto Milk Co. Ltd.* (1902), 5 O.L.R. 1, are distinguishable. In those cases the statute was not even substantially complied with. The word "confirmed," in sec. 88 of the Companies Act, means "sanctioned." See Stroud's Judicial Dictionary, vol. 1. A Court has no jurisdiction to interfere with the internal management of companies acting within their powers: *Burland v. Earle*, [1902] A.C. 83. Special powers are given the directors by sec. 87 of the Ontario Companies Act, and sec. 88 is only intended to keep a check on the directors in regard to salaries.

R. C. Levesconte, for the defendants. There was no compliance with the Ontario Companies Act: *Beaudry v. Read*, *supra*; *Birney v. Toronto Milk Co. Ltd.*, *supra*. The by-laws were not under seal. There were no real by-laws, but only a series of resolutions. The onus is on the plaintiff to establish the by-law: *Young & Co. v. Mayor, etc., of Royal Leamington Spa* (1883), 8 App. Cas. 517; *Dunston v. Imperial Gas Light and Coke Co.* (1832), 3 B. & Ad. 125. A body corporate is not bound by any contract which is not under its corporate seal: Lindley's Law of Companies, 6th ed., p. 269.

December 17. FALCONBRIDGE, C.J.:—The plaintiff's claim is for \$525 alleged to be due to him for his services as president of the defendant company.

My brother Clute held at the trial that there had been no compliance with the provisions of the Ontario Companies Act, 7 Edw. VII. ch. 34, sec. 88, and dismissed the action. The plaintiff now appeals.

The following extracts from minutes of meetings of directors and shareholders set forth the resolutions upon which the plaintiff bases his claim:—

1. Meeting of provisional directors held on the 4th September, 1907, at 4 p.m., by-law 12: "The president, vice-president, and

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*88. No by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting.

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directors shall receive such remuneration for their services as may by resolution of the board be determined, and no further by-law or confirmation by the shareholders, other than the confirmation of this general by-law, shall be necessary to provide for such remuneration."

2. Special general meeting of shareholders held on the 4th September, 1907, at 5 p.m.: "The minutes of the meeting of the provisional directors of this company this day held were read, and the general by-laws this day adopted by the provisional directors of the company, and consisting of articles 1 to 9, inclusive, in the said minutes set out, were carefully considered, and, upon motion duly seconded, said minutes were unanimously ratified and confirmed as the general by-laws of the company."

3. Meeting of shareholders held on the 4th September, 1907, at 8 p.m.: "Upon motion by A. R. Bickerstaff, seconded by Mr. George Rapley, it was unanimously resolved and carried that the president of the company be paid a salary of \$100 monthly."

4. Meeting of directors held on the 4th September, 1907, at 8.45 p.m.: "Upon motion, duly seconded, it was unanimously resolved and carried that, pursuant to the resolution of the shareholders, a salary of \$100 per month be paid to Mr. Ewan Mackenzie as president; the directors not to be personally liable for any salary to the president."

Thus it appears that, instead of a by-law having been confirmed at a general meeting, the initiative was taken at the meeting of shareholders, and then the directors assumed to pass a resolution pursuant to the resolution of the shareholders.

The question has been elaborately discussed and dealt with by my brother Riddell in *Beaudry v. Read*, 10 O.W.R. 622, and I am in entire accord with his opinion as set out on p. 625:—

"*Primâ facie*, directors of a company are not entitled to any remuneration in the absence of statutory authority: *Dunston v. Imperial Gas Light and Coke Co.*, 3 B. & Ad. 125; *Hutton v. West Cork R.W. Co.* (1883), 23 Ch.D. 654, 672. The provision in our statute is to be found in the Act of 1907, 7 Edw. VII. ch. 34, sec. 88: 'No by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting.'

"I think that this means that a by-law for the remuneration of

directors shall first be passed by the board of directors, the directors thus taking the responsibility of definitely asserting their claim to payment, and fixing the amount so claimed—and then this by-law shall be laid before a general meeting and passed upon by the body of shareholders.

“The directors being thus by implication given power to pass such a by-law, the body of shareholders are deprived of this power, which otherwise they might have: *The King v. Westwood* (1825-30), 4 Bli. N.R. 213, 4 B. & C. 781, at p. 799; *Hampson v. Price's Patent Candle Co.* (1876), 24 W.R. 754; *Stephenson v. Vokes* (1896), 27 O.R. 691, *per* Street, J., at p. 696; and see what is said in *York Tramways Co. v. Willows* (1882), 8 Q.B.D. 685, at p. 689, by Manisty, J., and at p. 695, by Coleridge, C.J.

“Nor is it entirely without importance that such a course should be pursued—there may be many instances in which a majority of the board of directors for the time being cannot be procured, while a majority of votes in a general meeting may; and there may be an instance in which a wily director would not take upon himself the responsibility, and perhaps odium, of openly asking for remuneration, when he would, with more or less shew of reluctance, accept it if voted. I think no complaint can fairly be made if it be decided that the provisions of the statute must be lived up to, and the rigour of the statute applied.”

A further objection to the plaintiff's recovery is raised, in that there is no by-law nor any contract under seal determining the amount of the remuneration—nothing in fact but a series of resolutions—with the exception of the general by-law, which my brother Clute rightly holds to be *ultra vires*: Lindley's Law of Companies, 6th ed., p. 269; *Dunston v. Imperial Gas Light and Coke Co.*, 3 B. & Ad. 125; *Young & Co. v. Mayor, etc., of Royal Leamington Spa*, 8 App. Cas. 517.

The appeal must be dismissed with costs.

SUTHERLAND, J.:—I agree with the judgment of the Chief Justice, and for the reasons stated by him therein.

BRITTON, J.:—The sole question, as put by the learned trial Judge, is “as to whether or not there has been a compliance with the provisions of the Ontario Companies Act, 7 Edw. VII. ch. 34,

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sec. 88. . . . But the ground, and the sole ground, upon which I put my judgment is that there has not been a compliance with the Act sufficiently to entitle the plaintiff to recover."

By sec. 87 of the Act the directors are empowered to pass by-laws to regulate . . . (c) the term of service, manner of selection, and qualification of the directors . . . and (f) the conduct in all other particulars of the affairs of the company.

It is, I think, important to notice that sub-sec. (d) of sec. 47 of R.S.O. 1897, ch. 191, as a separate sub-section, was left out of the new Act passed in the same year, 60 Vict. ch. 28. The omitted sub-sec. (d) was that the directors might pass by-laws to regulate "the appointment, functions, duties and removal of all officers, agents and servants of the company; the security to be given by them to the company; *and their remuneration.*"

The present sec. 88 was then introduced as sec. 46 of 60 Vict. ch. 28.

If fixing remuneration of the president by the directors; naming an amount, and inserting that amount in their by-law, was compulsory under the former Act, it is at least arguable that the directors are by the change relieved from that necessity. Section 88 recognises the right of the company to pay the president and directors and to pass a by-law for that purpose, but such by-law shall not be valid or acted upon until the same has been confirmed at a general meeting.

The company's by-law in question here was passed by the provisional directors. The provisional directors may pass by-laws, and they must call a general meeting of the shareholders and submit these by-laws to the shareholders for their sanction: see sec. 34.

The provisional directors, during the time they were such and so acting, had the same power as directors duly elected: see sec. 79.

No objection was taken to the meeting of shareholders. The matter then stands as follows:—

There was in fact a by-law by the provisional directors, article 5, sec. 1, creating the office of president and vice-president; and sec. 12 provided that the president should receive remuneration for his services—that must mean payment; and, if so, it is so far within the express words of sec. 88. But the by-law goes further, and expressly leaves the amount to be thereafter fixed by the directors by resolution—and provides that no further by-law or

confirmation by the shareholders, other than a confirmation of this general by-law, shall be necessary. At the general meeting of shareholders the by-laws of the provisional directors, including those above mentioned, "were unanimously ratified and confirmed," and they "were unanimously ratified and adopted as the general by-laws of the company." Then the shareholders at their general meeting, adjourned meeting, on the same day, passed this resolution as recorded in the minutes: "Upon motion by A. R. Bickerstaff, seconded by Mr. George Rapley, it was unanimously resolved and carried that the president of the company be paid a salary of \$100 monthly." Then, at a subsequent meeting of the elected directors, they passed a resolution recorded as follows: "Upon motion, duly seconded, it was unanimously resolved and carried that, pursuant to the resolution of the shareholders, a salary of \$100 per month be paid to Mr. Ewan Mackenzie as president; the directors not to be personally liable for any salary to the president."

I am of opinion that the statute was virtually complied with. There was a by-law for payment to the president of an amount to be afterwards fixed; that by-law was ratified by the shareholders; the shareholders, themselves, fixed the amount; and the directors then, in terms of the by-law, and as to amount in accordance with the expressed wish of the shareholders, fixed the amount of the remuneration or payment to be made.

This case is very different from *Beaudry v. Read*, 10 O.W.R. 622. If, however, that case can be said to be authority for the proposition that, in every case, before a director of a company can be paid anything for his services, there must be a by-law naming the amount of such payment, and that the shareholders must ratify that by-law, I do not agree. The directors, in my opinion, can by by-law declare in favour of payment, leaving it to themselves, after ratification by the shareholders, to fix the amount of such payment.

There was in this case all the protection the statute intended to give to the shareholders against directors using the company's money for payment to themselves for services or pretended services to the company.

It was suggested that no service was rendered. That was not established—the case did not turn upon that.

I think the appeal should be allowed, and judgment should be entered for the plaintiff for \$500. He should get the salary for only the even five months, and should get costs.

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Dec. 20.

JEWELL V. BROAD.

Infant — Contract — Fraudulent Representation as to Age — Benefit Obtained dehors the Contract — Equitable Relief — Estoppel.

The judgment of MULLOCK, C.J.Ex.D., 19 O.L.R. 1, was affirmed.

APPEAL by the plaintiff from the judgment of MULLOCK, C.J. Ex. D., 19 O.L.R. 1, dismissing the action, which was brought by the mother of an illegitimate child against the father, to recover moneys which the defendant, by an agreement in writing, covenanted to pay to the plaintiff for the child's maintenance.

The appeal was heard on the 3rd November, 1909, by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND, JJ.

M. Houston, for the plaintiff. On equitable grounds, the defendant should not be allowed to set up the defence of infancy: *Confederation Life Association v. Kinnear* (1896), 23 A.R. 497, especially at pp. 500, 502, 513; *Whalls v. Learn* (1888), 15 O.R. 481, at p. 487; *Bennetto v. Holden* (1874), 21 Gr. 222, at p. 227; *Ex p. Jones* (1881), 18 Ch. D. 109, at pp. 120, 122; *Wright v. Snowe* (1848), 2 DeG. & Sm. 321; *Ex p. Unity Joint Stock Mutual Banking Association, In re King* (1858), 3 DeG. & J. 63; *Helps v. Clayton* (1864), 17 C.B.N.S. 553; *Cornwall v. Hawkins* (1872), 41 L.J. Ch. 435; *Chapple v. Cooper* (1844), 13 M. & W. 252. An infant shall not take advantage of his own fraud: *Pollock's Principles of Contract*, 7th ed., p. 77; *Clarke v. Copley* (1789), 2 Cox Eq. 173. The contract was for the defendant's benefit. He could have been sued for seduction; the plaintiff could have filed her affidavit of affiliation.

O. L. Lewis, K.C., for the defendant. The defendant pleads infancy. After eight weeks there was a repudiation of the agreement by the defendant. The plaintiff could then have filed her affidavit of affiliation. The action for seduction could still be brought. If the plaintiff is debarred of any right, she lost it by her own laches. The cases cited on behalf of the plaintiff all deal with proprietary rights only, and in them the infant had received some benefit. They do not apply here. An infant cannot be charged

under a contract which is not for his benefit: *Beam v. Beatty* (No. 2) (1902), 4 O.L.R. 554, at pp. 557, 558, where Garrow, J.A., quotes from the judgment of Lord Coleridge, C.J., in *Meakin v. Morris* (1884), 12 Q.B.D. 352. *Confederation Life Association v. Kinnear* is distinguishable. Fraudulent misrepresentation as to age is no answer to the plea of infancy: *Bartlett v. Wells* (1862), 1 B. & S. 836; Leake's Law of Contracts, 5th ed., p. 381; Addison's Law of Contracts, 10th ed., p. 375; Encyc. of the Laws of England, 2nd ed., vol. 7, p. 163; Ruling Cases, vol. 6, p. 53. There was no ratification after full age: Bicknell & Kappele's Practical Statutes, p. 309; Addison's Law of Contracts, 10th ed., pp. 374, 375; Leake's Law of Contracts, 5th ed., pp. 379, 382. The agreement was no bar to the filing of the affidavit of affiliation: Encyc. of the Laws of Eng., 2nd ed., vol. 1, pp. 258, 259. The plaintiff cannot enforce this agreement, because she is now a married woman: Encyc. of the Laws of Eng., 2nd ed., vol. 1, pp. 248, 249.

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December 20. FALCONBRIDGE, C.J.:—The learned Chief Justice has, in my opinion, correctly distinguished the cases where it has been said that the infant is liable in equity for falsely representing himself to be of full age. The dictum is one which must be interpreted with reference to the ancient province of a Court of equity, *e.g.*, if he had obtained property on such a representation, he might be ordered to re-deliver it: *Clarke v. Cobley*, 2 Cox Eq. 173.

But this obligation in equity is not an obligation to perform the contract, and must be carefully distinguished from it: Pollock, 5th ed., p. 74.

In *Lemprière v. Lange* (1879), 12 Ch. D. 675, an action against an infant who had obtained a lease of a furnished house on an implied representation that he was of full age, it was held that the lease must be declared void and possession given up, and that the defendant was not liable for use and occupation.

Here there is nothing which the defendant can be ordered to restore or give up.

It is contended that the plaintiff was induced by the representation and agreement to forego filing an affidavit of affiliation under R.S.O. 1897, ch. 169, sec. 3; but it is manifest from the evidence on both sides that the parties were at arm's length, and

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the defendant, or his father on his behalf, had refused to pay any more while there was yet time to have filed the affidavit. And in any event I do not see how we could now enable the plaintiff to comply with the statute.

The appeal must be dismissed with costs.

BRITTON and SUTHERLAND, JJ., agreed in the result.

[BOYD, C.]

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 Dec. 27.

RE KARRY AND CITY OF CHATHAM.

Municipal Corporations—Power to Regulate Victualling Houses—Consolidated Municipal Act, sec. 583 (34)—Sunday Closing By-law—Reasonable Restraint—Duty of Inn-keeper.

A city by-law providing that victualling houses shall be closed every Sunday from 2 p.m. till 5 p.m. and from 7 p.m. on Sunday till 5 a.m. on the following Monday, is within the powers of a city council under sec. 583 (34) of the Consolidated Municipal Act, 7 Edw. VII. ch. 19.

It is no undue interference with private rights and no undue restraint upon business to impose such regulations.

In re Campbell and City of Stratford (1907), 14 O.L.R. 184, followed.

It is the duty of hotel-keepers to furnish food for travellers, and they cannot relieve themselves of their obligation by insisting that restaurants or victualling houses shall remain open at all times.

MOTION by James Karry, a restaurant-keeper in the city of Chatham, to quash a by-law passed by the city council purporting to regulate victualling houses and other places for refreshment or entertainment of the public. The facts are stated in the judgment.

The motion was heard by BOYD, C., in the Weekly Court, on the 22nd December, 1909.

J. M. Ferguson, for the applicant.

H. L. Drayton, K.C., for the city corporation.

December 27. BOYD, C.:—The by-law of the city of Chatham No. 369, passed on the 26th July, 1909, provides that every victualling house, etc., and all other places of like entertainment, shall be closed every Sunday from 2 p.m. till 5 p.m., and also from 7 p.m. on Sunday till 5 a.m. on the following Monday.

This is attacked by the applicant on various grounds: (1) as not being beneficial to the public, because it prevents people from obtaining meals during the prohibited hours; (2) that it is not a regulation but an attempt indirectly to close eating houses and restaurants, which under the general law may be kept open on Sunday; (3) because passed on a false representation that all the keepers of the said houses were in favour of it; (4) that it was an annoyance to night travellers, who could not get meals at those hours on Sundays; (5) that keeping open all Sundays had not proved to be a nuisance; and (6) that it is unreasonable because it deprives the public of the right to get meals at such time as is convenient to the public.

Affidavits are put in on both sides: it is not made out that there was any false representation. It is shewn that some late travellers had had to go to bed supperless, and there is a strong objection made by the hotel-keepers that they are no longer able to send the early or the midnight traveller to get food at the restaurants.

On the other side it is shewn that young people congregated on Sunday afternoons at these places, not for meals, but for ice cream and other commodities, and that parents and others were making objection to this happening on Sunday. However, it is not for the Court to weigh the reasons or motives which influenced the council, if the enactment was *bonâ fide* made and within the power of the municipality. The Court is not to sit in judgment upon the propriety or alleged un wisdom of the by-law, if it admits of reasonable justification. In regard to these local regulations, public representative bodies (such as the municipal council) are now regarded as having a free hand in dealing with subjects committed to their jurisdiction by the Legislature, and they are usually the best judges to determine what is expedient under existing circumstances and conditions. A by-law plainly oppressive—one which interferes unduly with the rights of the citizen—which would not be fairly justified by any reasonable man—may well invoke the interference of the Court; otherwise the Court is loath to invalidate.

One general principle has to be kept in mind, and it is well expressed by Lord Hobhouse in *Slattery v. Naylor* (1888), 13 App. Cas. 446, 449, 450: "It is difficult to see how the council can make

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efficient by-laws for such object as . . . regulating places of amusement . . . providing for the general health . . . not to mention others, unless they have substantial power of restraining people, both in their freedom of action and in their enjoyment of property.”

These places of public entertainment, by whatever name called (eating-houses, restaurants, temperance hotels), are proper subjects of municipal license. In this we have followed English precedent: see *Muir v. Keay* (1875), 40 J.P. 120; *Kelleway v. Macdougall* (1880), 45 J.P. 207; and *Howes v. Board of Inland Revenue* (1876), 1 Ex. D. 385. The power to license involves the power to regulate, and the power to regulate involves the considerations of conditions and times of restriction in the working of the licensed premises. The Municipal Act, 3 Edw. VII. ch. 19 sec. 583, No. 34,* gives direct and express power to cities to pass by-laws as to the licensing, limiting the number of, and regulating these victualling houses. If regulation means, as I think it does, the power to limit the time within which business may be carried on, or to specify the hours in which business shall be suspended on Sundays, and this is exercised in a reasonable way, no serious objection can be made to the by-law in hand. The case cited of *In re Campbell and City of Stratford* (1907), 14 O.L.R. 184, is so much in point as to the principle of decision that I would be bound to follow it, even though I did not agree with it, which I am far from saying. See also a case on all fours expressed in a judgment of great good sense: *State v. Freeman* (1859), 38 N.H. 426.

It appears to me that it is no undue interference with private rights and no undue restraint upon business to impose such regulations as are here made as to seasonable hours and times of doing this necessary business on Sundays. No doubt a period of enforced rest will be welcome to the keepers and employees of these houses on the day set apart for general rest throughout the country.

None of the reasons urged against the by-law carry weight in a legal aspect; the expedience of the council's action is not now

* 583. By-laws may be passed by the councils of the municipalities . . . and for the purposes in this section respectively mentioned, that is to say: . . . 34. For limiting the number of and regulating victualling houses, ordinaries, and houses where fruit, oysters, clams or victuals are sold to be eaten therein, and all other places for lodging, reception, refreshment or entertainment of the public. 35. For licensing the same. . .

in question. But one ground urged rests on a mistaken view of the hotel-keeper's duties, which ought not to be passed in silence. There are fourteen licensed hotels in Chatham, and these all have been, as a matter of public concern, "instituted for passengers and wayfaring men:" *Calye's Case* (1584), 8 Co. Rep. 32. However convenient it may be for the hotel-keepers to have a near-by restaurant to which they can turn the belated and hungry traveller of a Sunday night, they cannot so relieve themselves of their proper obligation to provide food, shelter, and protection for travellers. They are required to supply food and accommodation, and have a lien for their charges on the belongings of the guest: R.S.O. 1897, ch. 187, sec. 2. It is their business as public servants to provide lodging and suitable entertainment for all at a reasonable price. The true definition of an inn is a house where the traveller is furnished with everything which he may have occasion for while upon his way: *Thompson v. Lacy* (1820), 3 B. & Ald. 283, 286, 287. If he comes late, he can rouse up the innkeeper and call for supper and bed, and that is accommodation to which he is entitled. The guest is entitled to a sufficient supply of wholesome food, having regard to the time of his arrival: *Hawthorn v. Hammond* (1844), 1 C. & K. 404; and *Rex v. Ivens* (1835), 7 C. & P. 213, 219. If the hotel-keepers do not supply midnight travellers, and the source of supply from the restaurant has been taken away by the council, it is for the municipal authorities to see that the hotel-keepers do their duty and preserve their licenses from being imperilled.

All that the Court can now do is to dismiss this application with costs.

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Dec. 31.

REX V. FARRELL.

*Criminal Law—Perjury—Evidence of Proceeding in which Perjury Committed—
—Necessity for Production of Information—Defect in Proof—Objection not
Taken till Close of Case.*

The defendant was indicted for perjury alleged to have been committed at a preliminary examination before a police magistrate of a charge of perjury against W.:—

Held, that, the proceeding against W. having been commenced by information, the proceeding should have been proved, at the trial of the defendant, by production of the information; and, that not having been done, the proceeding was not proved by the evidence of the magistrate and of a stenographer who took down the testimony adduced before the magistrate; and the case against the defendant was properly withdrawn from the jury, although objection was not taken to the defect in the proof until the close of the case for the Crown; MEREDITH, J.A., dissenting.

Rex v. Drummond (1905), 10 O.L.R. 546, *Rex v. Le Gros* (1908), 17 O.L.R. 425, and *Regina v. Dillon* (1877), 14 Cox C.C. 4, followed.

CASE stated, at the request of the Crown, under sec. 1014 of the Criminal Code, by MCGIBBON, Chairman of the Sessions for the county of Peel.

On the 9th June, 1909, the prisoner, James Farrell, was tried before the Chairman and a jury, for perjury alleged to have been committed at a preliminary examination before a police magistrate of a charge of perjury against one Hugh Whitty. The Chairman, after hearing the evidence for the Crown, withdrew the case from the jury and discharged the prisoner, on the ground that the Crown had failed to produce sufficient evidence, by not producing any record of the hearing or the result thereof in the police court where the perjury was alleged to have been committed. The question stated for the consideration of the Court was, "Was I right in withdrawing the case from the jury on the above ground?"

The case was heard on the 13th October, 1909, by Moss, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

E. Bayly, K.C., for the Crown. Although the information charging Whitty with perjury was not put in at the trial of the defendant, yet the shorthand notes and the magistrate's evidence were put in and were sufficient: *Rex v. Yaldon* (1908), 17 O.L.R. 179, 181, 184; *The Queen v. Hughes* (1879), 4 Q.B.D. 614. [Moss, C.J.O., referred to *Rex v. Legros* (1908), 17 O.L.R. 425.] The evidence was not objected to when given, and it was too late to object at the close of the case.

J. W. Roswell, for the prisoner. The occasion must be proved by the best evidence. The information must be produced. In *Rex v. Yaldon* the best evidence obtainable was produced. See also *Regina v. Dillon* (1877), 14 Cox C.C. 4; *Rex v. Drummond* (1905), 10 O.L.R. 546; Archbold's Criminal Pleading, 23rd ed., pp. 315 and 1064.

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December 31. OSLER, J.A.:—The proceeding in which the alleged perjury was committed was commenced by information, and it is difficult to understand why the proper and well-known course of procedure in proving it by production of the information was not followed. The cases of *Rex v. Drummond*, 10 O.L.R. 546, *Rex v. Le Gros*, 17 O.L.R. 425, and *Regina v. Dillon*, 14 Cox C.C. 4, cited by Mr. Roswell, shew that the omission was fatal to the prosecution, and that the prisoner, for lack, it may be, only of the formal but necessary evidence of the former proceeding in which the alleged perjury was committed, was properly acquitted. See also *Rex v. Eugene Brooks* (1906), 11 O.L.R. 525; *The Queen v. Gibson* (1887), 18 Q.B.D. 537; *The Queen v. Moore* (1892), 61 L.J.M.C. 80—which are strong to shew that the objection to the defect in the proof was properly taken, or that it was not too late to take it, as it was taken here, at the close of the case for the Crown.

The answer to the question submitted must therefore be in the affirmative.

MACLAREN, J.A.:—This is a case reserved at the request of the Crown by the Chairman of the Sessions for the county of Peel.

The defendant was indicted for perjury alleged to have been committed at a preliminary examination before Robert Crawford, police magistrate, of a charge of perjury against one Hugh Whitty.

According to the stated case, Crawford appeared as a witness at the trial of the defendant at the Sessions, in the present case, and proved that an information was laid before him against Hugh Whitty on a charge of perjury, and that on the investigation of such charge the accused, Farrell, was duly sworn and gave evidence. The stenographer by whom the evidence was taken down also gave evidence to the same effect, and it was further proved by them that Whitty was committed for trial. After further

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evidence as to the commission of the offence of perjury, the Crown closed its case, and, on objection raised by counsel for the accused Farrell, the Chairman withdrew the case from the jury, "on the ground that the Crown had failed to produce sufficient evidence, by not producing any record of the hearing or the result thereof in the police court where the perjury was alleged to have been committed." He now asks this Court, "Was I right in withdrawing the case from the jury on the above ground?"

By sec. 170 of the Criminal Code, perjury is defined as "an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his evidence, upon oath or affirmation, whether such evidence is given in open court, or by affidavit or otherwise, and whether such evidence is material or not, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury or person holding the proceeding."

Section 171 (2) provides (omitting words inapplicable to this case): "Every proceeding is judicial within the meaning of the last preceding section which is held . . . before any justice . . . authorised by law or by any statute in force for the time being to make an inquiry and take evidence therein upon oath . . . or before any person acting as a . . . justice . . . having power to hold such judicial proceeding . . . whether the proceeding was duly instituted or not before such . . . person so as to authorise . . . him to hold the proceeding, and although such proceeding was held in a wrong place or was otherwise invalid."

The "judicial proceeding" must be legally proved, as well as the statement of the witness and its falsity. As stated by Hawkins, J., in *The Queen v. Hughes*, 4 Q.B.D. 614, at p. 628, "perjury cannot be committed by a witness who is sworn in a non-existing cause." And a cause or proceeding, the existence of which is not legally proved, must be taken to be non-existing, in any proceeding where such proof should have been made. The reserved case states, and the evidence of the magistrate Crawford, which is made a part of it, shews, that the proceeding at which the alleged perjury was committed was a preliminary inquiry based upon an information in writing. The best evidence of this information, and that it was such a document as the law authorised the magistrate to

make the foundation of such a preliminary inquiry, and to take evidence upon under oath, would be the information itself. There is no evidence that it could not be produced, nor anything to justify the admission of secondary evidence to prove the contents of the information or the proceedings; so that the parol evidence was inadmissible and insufficient.

Such would also have been my opinion if the matter were *res integra*. In addition, I consider that we are compelled to this conclusion by former decisions of this Court which are binding upon us.

The case of *Rex v. Drummond*, 10 O.L.R. 546, is on all fours with the present case, except that there the perjury was alleged to have been committed at a trial at the Assizes instead of at a preliminary inquiry, as here. This, in my opinion, makes no difference, save that in that case, instead of producing the record of the trial, secondary evidence by a certificate under sec. 691 of the Code might have been produced. There Osler, J.A., says, at p. 548: "One well-established requirement in the trial of such an indictment for perjury as the present is the legal proof of the trial at which the alleged perjury was committed. Another, equally well established, is that, such trial being matter of record, it is to be proved by the production of the record of the former trial, that is to say, the sworn or exemplified copy of the indictment and of the verdict and judgment thereon, or by some authoritative document which the law has declared to be a sufficient substitute therefor." And MacLennan, J.A., says at p. 551: "The fact of the murder trial was an essential part of the case against defendant, and had to be proved." The other members of the Court concurred, and the conviction was quashed and a new trial ordered.

In *Rex v. Legros*, 17 O.L.R. 425, the perjury charged was alleged to have been committed at a summary trial for theft. Only oral evidence of the proceedings at the trial was given. This Court held that the formal record of the trial should have been produced or proved in the ordinary way, and that there was, therefore, not sufficient evidence to justify the conviction.

The principle of these cases is applicable; the information in the present case taking the place of the indictment in the *Drummond* case, and the charge in the *Legros* case. See also to the same effect *Regina v. Dillon*, 14 Cox C.C. 4.

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No authority was cited to us nor have I been able to find any which would justify the admission of secondary evidence as to the information and proceedings if it had been objected to when it was offered. So that in that event the well-known rule as to the production of the best evidence should have been followed. See *Regina v. Coles* (1887), 16 Cox C.C. 165; Archbold, 23rd ed., p. 1053; Roscoe, 13th ed., p. 681; Phipson, 3rd ed., p. 497; *Rex v. Yaldon*, 17 O.L.R. 179, at p. 182; *Rex v. Legros*, *ib.* 425, at p. 427.

But it is said that, even assuming that the secondary evidence should not have been received if objected to, yet it became good evidence when not objected to at the time of its reception, and that objection at the close of the case for the prosecution came too late.

Doe d. Phillip v. Benjamin (1839), 9 A. & E. 644, *Goslin v. Corry* (1844), 7 M. & G. 342, and *Reed v. Lamb* (1860), 6 H. & N. 751, are cases where this doctrine was laid down by eminent Judges, and they are cited in its support by leading text-writers. It is to be noted that they are all civil jury cases, and that the same rule is not applied in non-jury cases: see *Jacker v. International Cable Co.* (1888), 5 Times L.R. 13; *Webb v. Ottawa Car Co.* (1903), 2 O.W.R. 62, at p. 63; *McLennan v. Gordon* (1905), 5 O.W.R. 98, at p. 101.

Is the same rule applicable in criminal cases? In many of the reports of criminal cases, where the admission of secondary evidence was held to be fatal, it does not clearly appear at what stage the objection was first made. In *Rex v. Drummond*, *supra*, neither the stated case nor the report makes this clear. In the stated case the trial Judge refers to the objection after his summary of the evidence, but does not say at what point it was made by counsel for the defendant. In *Rex v. Legros*, *supra*, the defendant was represented by counsel, but the case does not even state that the objection was raised by him at any stage. In *Regina v. Dillon*, 14 Cox C.C. 4, the prisoner was undefended, and the trial Judge declined to receive the testimony of the clerk of the justices as to the nature of the information, and said the information must be produced or evidence given of its destruction. In *Regina v. Coles*, 16 Cox C.C. 165, the objection was taken when the evidence was offered; as also in *The Queen v. Brittleton* (1884),

12 Q.B.D. 266. In *The Queen v. Garneau* (1899), 4 Can. Crim. Cas. 69, the objection was taken at the close of the case for the Crown; in *The Queen v. Gibson*, 18 Q.B.D. 537, the objection was made only after the jury had retired, as also in *The Queen v. Saunders*, [1899] 1 Q.B. 490; and apparently so in *Rex v. Eugene Brooks*, 11 O.L.R. 525; while in *The Queen v. Moore*, 61 L.J. M.C. 80, it was taken only after the verdict; and yet in each of these cases it was held that it was not too late. In some of them the evidence was inadmissible, because the proper foundation was not laid for it, while in others it would be inadmissible in any event.

In *The Queen v. Gibson*, *supra*, Wills, J., says at p. 543: "I agree that the course taken by the counsel has no bearing upon the question before us. If a mistake had been made by counsel, that would not relieve the Judge from the duty to see that proper evidence only was before the jury." And this language was approved and adopted by this Court in *Rex v. Eugene Brooks*, 11 O.L.R. 525, at p. 528. In *The Queen v. Moore*, *supra*, Hawkins, J., says, at p. 81: "The fact that the prisoner's counsel has taken no objection does not make the evidence admissible."

I have not been able to find a single reported case where the above rule, followed in civil jury cases, was adopted in a criminal case. There may be a good reason for the distinction. Life and liberty are too sacred and are too jealously guarded to allow them to be imperilled by what may be called a technicality and a principle that may be considered a mere implication.

I am of opinion that the law is properly summed up in Taylor on Evidence, 10th ed., sec. 1881 c., where he says: "If in a *civil* case (jury) inadmissible evidence be received *without objection*, the opposite party cannot afterwards object to its having been received, or obtain a new trial on the ground that the Judge did not expressly warn the jury to place no reliance upon it. But if, in a *criminal* case, inadmissible evidence is in fact received, and left to the jury, a conviction is bad, even where there is sufficient other evidence to sustain it."

It may be said that, if the rule against the admission of secondary evidence should be enforced as strictly as above suggested, there would be danger of cases being decided upon technicalities and the ends of justice being sometimes thereby defeated. Even if so,

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any interference should be a matter to be dealt with by Parliament rather than by the Courts.

However, it will probably be found that the application of the principle laid down in sec. 1019 of the Code will be a sufficient safeguard on this point, as the improper admission or rejection of evidence is not fatal unless the Court of Appeal is of opinion that it has occasioned some substantial wrong or a miscarriage of justice at the trial.

This principle has no application to a case like the present. Here the question is whether there was any legal evidence of the information which formed the foundation of the judicial proceeding, or any legal evidence that there was a judicial proceeding at all, which necessarily forms the basis of any prosecution for perjury.

I am of opinion that the answer to the question reserved should be in the affirmative, and that the learned Chairman had a right to withdraw the case from the jury.

MOSS, C.J.O., and GARROW, J.A., concurred.

MEREDITH, J.A. (dissenting):—I feel obliged again to decline, in the firmest manner possible, to consider any question other than that which has been lawfully stated for the opinion of this Court, and again to call attention to the danger of, and the excess of jurisdiction in, treating any or every reserved case as an opening up of the whole trial for review upon every question which arose, or might have arisen, at the trial. The jurisdiction of this Court in criminal cases being very narrow, and very clearly expressed, I can find no excuse for overstepping it, no matter how strong may be the desire to correct things which in one's own mind may seem erroneous in fact, or in law, or inequitable.

In order to guard myself against the possibility of any misunderstanding of the question which is reserved, it will be better to state it in the words of the reserved case: "I withdrew the case from the jury and discharged the prisoner, on the ground that the Crown had failed to produce sufficient evidence, by not producing any record of the hearing or the result thereof in the police court where the perjury was alleged to have been committed. The question stated for the consideration of the Court is: Was I right in withdrawing the case from the jury on the above ground?"

Very clearly the answer must be, "no," because there could be no such "record." The police court is not a court of record. The "result" was of course entirely immaterial; as also was the "hearing," except in so far as by that word may be meant the oath of the prisoner, and his testimony, thereat.

Quite apart from this case, I feel obliged to express my dissent from the opinions expressed in writing by Maclaren, J.A., in this case, which I have had the benefit of perusing.

It seems to me to be immaterial whether there was, or was not, an information in the police court proceedings; and, consequently, proof of it was quite unnecessary.

Under the Criminal Code, "Perjury is an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness *in a judicial proceeding* as part of his evidence, upon oath or affirmation, whether such evidence is given in open court, or by affidavit or otherwise, and whether such evidence is material or not, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury or person holding the proceeding." And, "Every person is a witness within the meaning of the last preceding section who actually gives his evidence, whether he was competent to be a witness or not, and whether his evidence was admissible or not." And, "*Every proceeding is judicial* within the meaning of the last preceding section *which is held in or under the authority of* any court of justice, or before a grand jury, or before either the Senate or House of Commons of Canada, or any committee of either the Senate or House of Commons, or before any legislative council, legislative assembly or house of assembly or any committee thereof, empowered by law to administer an oath, *or before any justice*, or any arbitrator or umpire, or any person or body of persons authorised by law or by any statute in force for the time being to make an inquiry and take evidence therein upon oath, or before any legal tribunal by which any legal right or liability can be established, or before any person acting as a court, justice or tribunal, *having power to hold such judicial proceeding, whether duly constituted or not, and whether the proceeding was duly instituted or not before such court or person so as to authorise it or him to hold the proceeding, and although such proceeding was held in a wrong place or was otherwise invalid.*"

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It being immaterial whether the proceeding in the police court "*was duly instituted or not*," it is quite beyond my power to understand how any prosecution for perjury should fail because there was only secondary evidence of that which need not be proved at all. The cases decided in countries in which there is no such legislative provision, as well as the cases in this Province merely following them, can hardly be safe guides.

If a question had been duly stated in regard to the proof of the perjury assigned, I am not sure that I should be able to agree with the opinion expressed by MacLaren, J.A.

Upon the question whether the prisoner could take advantage of an objectionable method of giving evidence in the manner in which he has sought to, I may point out that cases decided in days when a criminal trial was something very different from such a trial in these days, when the accused has all the benefits of a party to a civil action, and can, even through his counsel or solicitor, dispense with proof of any fact alleged against him, may not carry with them the technical obstruction to the due course of justice which would follow from a liberal application of them; that the evidence admitted was not inadmissible evidence, but only that it had not been given in the regular manner—secondary instead of primary evidence; and that the cases cited for the proposition that want of objection at the time does not prevent subsequent objection, are all cases in which the evidence was in no manner or in any sense admissible, not merely cases in which the evidence was not only admissible but essential, the only question being as to the manner in which it was presented.

One thing, however, is very clear, and that is that in a case where counsel stands by and purposely abstains from objecting to an error easily corrected until it is too late to correct it, and then seeks to obtain all the benefits which a timely objection would have clearly entitled him to, no Court should go out of its way, much less exceed its power, to aid an escape from the proper results of a fair trial in which nothing but admissible evidence was adduced, whether in a regular or irregular manner.

It is also very clear, to my mind, that in a case such as this, in which the error could have been corrected when the objection was made, the proper course is to permit it to be corrected, not to aid in a miscarriage of justice.

[IN THE COURT OF APPEAL.]

RE LAKE ONTARIO NAVIGATION CO.

DAVIS'S CASE.

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Company — Winding-up — Contributory — Shares — Conditional Application — Allotment — Right to Repudiate — Conduct Approbating Contract — Estoppel — Director — Misfeasance.

D. made an application in writing to the company for 130 shares of stock, of the par value of \$13,000, agreeing to pay therefor the sum of \$1,300, "on the condition that no further call be made thereon." At a directors' meeting the application was accepted by resolution, and the shares allotted to D., in consideration of \$1,300 to be paid on demand. In the minutes of the proceedings at the meeting there was a memorandum, following the resolution, that the shares "were allotted and issued on the condition that no further call would be made thereon." The meaning was that the shares were to be considered as fully paid up. No written notice was given to D., but H., the president, informed him of the action of the directors, and D. gave the company his cheque for the \$1,300, and gave a proxy in favour of another shareholder to vote at a meeting of shareholders. The proxy was used for voting for directors at the meeting, but objection was raised as to the right of D. to vote on these shares. H. informed D. of the objection raised, and D. at once stopped payment of his cheque, and informed H. that he would have nothing more to do with the shares. Three months later a winding-up order was made. It appeared that D.'s name was on the register as the holder of 130 shares, and there was among the company's papers a certificate, signed by the president and secretary, stating that D. was the owner of 130 shares, but not stating whether they were fully paid up or not. There was no evidence that D. was aware either of the entry or the certificate:—

Held, that D. was not liable as a contributory.

In re Railway Time Tables Publishing Co., Ex p. Sandys (1889), 42 Ch.D. 98, distinguished.

Per MACLAREN, J.A., that it was not necessary, in the circumstances, for D. to bring an action to have his name removed from the register; his repudiation was sufficient.

Held, also, that, D. not being liable, H. could not be liable for misfeasance for acquiescing in the stopping of payment of D.'s cheque, and thereby causing a loss to the company of \$1,300.

Decision of TEETZEL, J., 18 O.L.R. 354, reversed.

APPEALS, by special leave, by Davis and Hutchinson, from the order of TEETZEL, J., 18 O.L.R. 354, directing that Davis be placed on the list of contributories of the Lake Ontario Navigation Co. in respect of 130 shares, and directing Hutchinson to pay to the liquidator of the company \$1,300 for misfeasance as a director.

The appeals were (by order) consolidated and heard together by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A., on the 26th November, 1909.

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I. F. Hellmuth, K.C., for Hutchinson, appellant. Davis was not liable as a contributory, nor was he estopped from denying liability. Davis took the first opportunity to repudiate liability upon the alleged contract to take shares. The facts of *In re Railway Time Tables Publishing Co.*, *Ex p. Sandys* (1889), 42 Ch. D. 98, are different from those of this case. Mrs. Sandys got what she wanted to buy; Davis did not. See what Cotton, L.J., says in the *Sandys* case, at p. 112; also *Re Pakenham Pork Packing Co.*, *Higginbotham's Case* (1906), 12 O.L.R. 100, at p. 112. There was no valid or enforceable contract to take any shares which the company had power or authority to allot. There was no legal liability by which Davis could be held a shareholder or contributory. If Davis is not liable, Hutchinson cannot be liable. Even assuming that Davis is liable, which is denied, this appellant was not guilty of misfeasance, but, on the contrary, his conduct was entirely justifiable. See *In re Manes Tailoring Co.* (1909), 18 O.L.R. 572, at p. 582, where *In re Forest of Dean Coal Mining Co.* (1878), 10 Ch. D. 450, is cited.

F. J. Dunbar, for Davis, appellant, adopted the argument of counsel for Hutchinson, and pointed out the distinction between the *Sandys* case and the present.

M. C. Cameron, for the liquidator, respondent. Davis applied for and was allotted 130 shares of \$100 each, on which \$10 per share only had been paid. Upon the allotment of the shares he exercised his rights as a shareholder, thereby estopping himself from denying his obligations as a shareholder. Any refusal by Davis to accept allotment of the shares, or any attempt to repudiate liability upon his contract to take shares or as a shareholder, was made after he had estopped himself from denying that he was a shareholder. In the *Pakenham* case (*supra*) there was no allotment; here there was. The company did not acquiesce in Davis's repudiation; and a mere repudiation is not sufficient; Davis should have brought an action to have his name removed from the register: *In re Addlestone Linoleum Co.* (1887), 37 Ch. D. 191; *Ooregum Gold Mining Co. of India v. Roper*, [1892] A.C. 125. Even if Davis's contract was capable of being avoided when the company was a going concern, it ceased to be so immediately on the winding-up: *In re Southport and West Lancashire Banking Co.*, *Fisher's Case* (1885), 31 Ch. D. 120.

J. H. Moss, K.C., for shareholders, respondents. Hutchinson was guilty of misfeasance. These respondents rely upon the reasons given and the authorities cited below. There was no contract for fully paid up stock. Davis was to become a shareholder for 130 shares at \$100 each. He paid \$1,300 on the full amount. The directors agreed not to call upon him for the balance, but they did not agree that they would not hold him liable in case of a winding-up: *In re Southport and West Lancashire Banking Co., Fisher's Case*, 31 Ch. D. 120; *North-West Electric Co. v. Walsh* (1898), 29 S.C.R. 33; *Re Thunder Hill Mining Co.* (1895), 4 B.C.R. 61; the Winding-up Act, R.S.C. 1906, ch. 144, secs. 51, 53. If Davis is liable, Hutchinson is liable.

Hellmuth, in reply. Davis is not liable, even after the winding-up: *In re Ontario Express and Transportation Co.* (1894), 21 A.R. 646, at p. 657. The certificate given was for a different kind of stock than applied for, and he did not acquiesce in the variation, so there was no contract: *In re United Ports and General Insurance Co., Beck's Case* (1874), L.R. 9 Ch. 392; *McCracken v. McIntyre* (1877), 1 S.C.R. 479.

December 31. MACLAREN, J.A.:—Appeal by Davis from an order of Teetzel, J., placing him upon the list of contributories for \$11,700, as being the holder of 130 shares of the company, on which only 10 per cent. had been paid. This had been paid by the previous holder, and the shares had been subsequently forfeited to the company for the non-payment of further calls.

Hutchinson, the president of the company, was a friend of Davis, and told him that the company had 130 shares to dispose of, which he thought Davis could buy for \$1,300. Davis thereupon, on the 2nd February, 1907, made an application in writing for 130 partly paid up shares, agreeing to pay therefor the sum of \$1,300, adding, "I apply for these shares on the condition that no further call be made thereon." At a directors' meeting, held the same day, the application was accepted by resolution, and the shares allotted to him, in consideration of \$1,300 to be paid on demand. Following the resolution is a memorandum in the minute book that "the said shares were allotted and issued on the condition that no further call would be made thereon." It clearly appears that all the parties intended that these words should mean that the shares were to be considered as fully paid up.

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No written notice of the action of the directors or of the allotment was given to Davis, but Hutchinson, the president, informed him of it, and on the 11th February Davis gave to the secretary of the company his cheque, dated the 9th February, for the \$1,300, and gave a proxy in favour of another shareholder to vote on the 130 shares at a meeting of shareholders to be held on that day. The proxy was used for voting for directors at the meeting, but objection was raised as to the right of Davis to vote on these shares. Hutchinson informed Davis of the objection raised, and Davis at once stopped payment of his cheque, and informed Hutchinson that he would have nothing more to do with the shares.

On the 14th May, 1907, a winding-up order was made against the company. It appeared that Davis's name was on the register as the holder of 130 shares, as of the 9th February, 1907, and there was among the company's papers a certificate, signed by the president and secretary, dated the 9th February, 1907, stating that Davis was the owner of 130 shares, but not stating whether they were fully paid up or not. There is no evidence that Davis was aware either of this entry or certificate.

It was strongly argued before us on behalf of the liquidator that, Davis not having brought an action to have his name removed from the register before the commencement of the winding-up, he must be held liable, and *Ooregum Gold Mining Co. of India v. Roper*, [1892] A.C. 125, *In re Southport and West Lancashire Banking Co.*, *Fisher's Case*, 31 Ch. D. 120, and *In re Addlestone Linoleum Co.*, 37 Ch. D. 191, were cited in support of this proposition.

It is to be observed that this does not apply to every case where a name is upon the register. If the shareholder asserts that he became a shareholder through fraud, or under a contract that was voidable, and rescission is necessary, the rule applies; but where it was wholly void, and he was not liable either by contract or by estoppel, the rule does not apply. It is enough if he promptly repudiates, so that he may not be made liable by estoppel.

In the present case, the only information Davis had was a verbal communication from Hutchinson that the directors had given him what he applied for, namely, fully paid up shares, on which there was no further liability. On this information he gave his cheque and proxy. As soon as he learned that there

was a question about the shares and objections raised, he repudiated at once by stopping payment of the cheque, and notifying Hutchinson that he would have nothing more to do with the shares. The only notice he had received was a verbal one from Hutchinson, the president, and he repudiated to the same officer and in the same manner, and this information was communicated to the secretary and the company, and, so far as Davis knew, was acquiesced in by the company, as the cheque was never presented to the bank, and no notice, written or verbal, was ever given to him. He had no knowledge of the terms of the resolution of the directors nor of the entry of his name in the register. The words of Lindley, L.J., in *In re Addlestone Linoleum Co.*, 37 Ch. D., at p. 205, are quite in point here, where he says: "If . . . it was a contract to take fully paid up shares, then, as these are not fully paid up shares, the appellants might have repudiated them; but they have kept them and cannot now get rid of them."

By sec. 76 of the Companies Act, R.S.O. 1897, ch. 191, the books of the company are *primâ facie* evidence against a shareholder; but they are merely *primâ facie* evidence, and the contrary may be established, as I think has been done in the present case.

The *Sandys* case, 42 Ch. D. 98, to which we were referred, is not at all analogous to the present. The allotment there was made on the 14th January, 1887; on the 30th March the shareholder sold some of the shares, and in April and August following sold others, receiving fresh certificates after each sale; and the only mistake was on a question of law as to liability. As will be seen, there were no such acts or laches or acquiescence in this case.

On the whole, I am of opinion that the appeal should be allowed, and Davis's name removed from the list of contributories.

The case of Hutchinson, the president, who was placed on the list of contributories for \$1,300 for misfeasance for acquiescing in the stopping of payment of Davis's cheque, and thereby causing a loss to the company of the \$1,300, naturally follows the result in the Davis case. If Davis had a right to stop payment of his cheque, as I think he had, then it was no part of the duty of Hutchinson to endeavour to collect money to which the company was not entitled.

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His appeal should also be allowed, and his name removed from the list of contributories.

MEREDITH, J.A.:—The appellant Davis applied, in writing, for 130 shares, at the price of \$1,300. The whole testimony—to which credit has been given, and which is not now questioned—makes it very plain that the full price of that which the appellant was to get was \$1,300.

Instead of allotting to him any such shares, the directors of the company allotted 130 shares, the price of which was \$13,000. The moment he became aware of that fact, he stopped the cheque he had given for the \$1,300, the full amount of the purchase money; and refused to have anything more to do with the matter.

In the meantime he had given a proxy to vote upon the shares which he had applied for; and that proxy was acted upon; but there was no sort of acceptance of the stock actually allotted, nor any sort of intention to accept it; instead, there was the promptest rejection of the shares which were allotted.

In these circumstances, it would be extraordinary if the appellant were in law liable for the \$13,000—liable to pay for something he never applied for, never bought, nor ever accepted.

It is not a case of buying the ordinary stock of the company under some mistake of law, or of fact, on the part of the purchaser, as to the effect of becoming such a purchaser.

I know of no difference in principle between a sale of personal property of this character and that of any other. There must be an actual sale; if one bargain for one thing he cannot be compelled to accept another.

In this case the appellant applied for one thing, and was offered another, which he promptly rejected. Authorising his proxy to vote upon the stock which he was to get—not that which was allotted—was in no sense an acceptance of that which was offered in lieu of that which was sought; nor could it have any legal effect, conferring no legal power to vote.

The *Sandys* case is not an authority to the contrary; indeed, in that case it was held that there was no liability under the original contract, but it was held that subsequent conduct evidenced a subsequent contract to take stock as allotted.

I would allow the appeal.

In Hutchinson's case there can be no liability if there be none in Davis's case. Davis should, and must, eventually have had the money returned to him if it had been actually paid over to, and been retained by, the company; so that any intervention by Hutchinson caused no loss or injury to the company.

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MOSS, C.J.O., OSLER and GARROW, JJ.A., concurred.

[IN THE COURT OF APPEAL.]

RE NIAGARA FALLS BOARD OF TRADE AND INTERNATIONAL
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Electric Railway—Passenger Fares—Approval of Tariff by Park Commissioners—Ontario Railway Act, 1906, sec. 171 (5)—Ontario Railway and Municipal Board—55 Vict. ch. 96 (O.)

Dec. 31.

The Ontario Railway and Municipal Board, upon an application by the Board of Trade above-named, made an order compelling the International Railway Company, owning and operating an electric railway along the bank of the Niagara river from Queenston to Chippawa, and incorporated by 55 Vict. ch. 96 (O.), to comply with sec. 171 of the Ontario Railway Act, 1906, by accepting a five cent cash fare for conveying passengers for any distance not exceeding three miles, etc.:—

Held, reversing the order of the Board, that the company came within subsec. 5 of sec. 171, providing that "this section shall not apply to a company whose tariff for passenger fares is subject to the approval of any commissioners in whom are vested any park or lands owned by the Crown for the use of the public of the Province of Ontario;" and, sec. 171 being thus excluded, that the Board had no power, on an application such as was made in this case, to direct what fares the company should charge.

The effect of the incorporation into the company's Act of sec. 31 of the Railway Act of Ontario, R.S.O. 1887, ch. 170, was not to abrogate clause 32 of the agreement with the Commissioners for the Queen Victoria Niagara Fall Park, set out as schedule B to the company's Act. They should be read together in such a way as to give effect to both; and reading them as subjecting the company's tariff to the approval of both the commissioners and the Lieutenant-Governor in council (or the Board substituted therefor) was not inconsistent with the intention of the parties.

THE International Railway Company owned and operated an electric railway along the bank of the Niagara river from Queenston to Chippawa, passing through the city of Niagara Falls, Ontario.

The Board of Trade of the City of Niagara Falls served on the railway company a notice of an application to the Ontario Railway and Municipal Board for an order compelling the railway company to accept a five cent cash fare paid on the cars for con-

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veying passengers for any distance not more than three miles south of Bridge street, in the city of Niagara Falls.

The notice recited that the railway company had exclusive control for electric railway purposes of the bank of the Niagara river between Bridge street, in the city of Niagara Falls, and Chippawa, thus having a monopoly of the scenic route along the River road in Niagara Falls, through the Queen Victoria Niagara Falls Park, passing the Falls, skirting the Upper Rapids, and on through to Chippawa; that all persons desiring to travel along the River road to the Park or Rapids were compelled to use this railway; and that the minimum cash fare on the cars of the railway company was ten cents, no matter how short the ride.

The Ontario Railway and Municipal Board, on the 6th May, 1909, made an order directing that the railway company accept a five cent cash fare for conveying passengers for any distance not exceeding three miles south of Bridge street, in the city of Niagara Falls, in the county of Welland, on their line of electric railway running between Bridge street and Chippawa.

The Chairman of the Board gave reasons for the order as follow:—

This is an application made by the Board of Trade of Niagara Falls against the International Railway Company, alleging that the company, in the operation of their electric railway from Chippawa to Queenston, charge the public travelling on their cars a minimum cash fare of ten cents, no matter how short the distance, contrary to sec. 171 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, and praying that relief may be granted by this Board, compelling the company to accept a five cent fare for conveying passengers for any distance not exceeding three miles south of Bridge street.

The purpose of this application, evidently, is to compel the company to comply with sec. 171 of the Act, which provides that the fares on railways operated by electricity shall not exceed five cents for any distance not exceeding three miles, and where the distance exceeds three miles then not exceeding two cents per mile or fraction thereof for the distance actually travelled.

The applicants did not apply to this Board for an order directing the company to file a reply, and the practice of the Board did not require the company to do so without an order. On the

hearing of the application before the Board, the company, however, alleged, as their sole defence, that this Board had no jurisdiction to fix the passenger rates which can be charged by the company, but, on the contrary, that the commissioners of the Queen Victoria Niagara Falls Park had the power to fix such rates. The issue is, therefore, clear cut. Who has the power and authority to fix the passenger rates—this Board or the commissioners?

It is necessary carefully to consider the original Act incorporating the company, 55 Vict. ch. 96 (O.), intituled "An Act to incorporate the Niagara Falls Park and River Railway Company," as well as the agreement set forth in schedule B to that Act. The agreement was made on the 4th December, 1891, between the Commissioners and Edmund B. Osler and others. At the time the agreement was entered into, the parties thereto had no authority to make it; consequently it was necessary to validate it by Act of the Legislature. This was done by sec. 1 of the company's incorporation Act, 55 Vict. ch. 96. Section 32 of the agreement in schedule B to that Act provides that the company's tariff for passengers shall be a reasonable one, and shall be subject to the approval of the commissioners, provided that the commissioners are not to have the right to insist upon such a tariff as will prevent the company operating the railway at a fair profit, but it shall be their privilege to exact from the company the imposition of reasonable rates only. It is upon this clause of the agreement and sub-sec. 5* of sec. 171 of the Ontario Railway Act, 1906, that the company rest their contention that the commissioners, and not the Board, have authority to fix the rates.

By sec. 5 of 55 Vict. ch. 96, the clauses and provisions of the Railway Act of Ontario and the amendments thereto, save as barred, varied, or excepted by the Act itself, etc., formed part of the Act.

By the same section, certain portions of the Railway Act were expressly excluded from the Act of incorporation. Shortly stated, the effect of sec. 5 was to incorporate therein sec. 31 of R.S.O. 1887, ch. 170, the then Railway Act of Ontario, and make that

* (5) This section shall not apply to a company whose tariff for passenger fares is subject to the approval of any commissioners in whom are vested any park or lands owned by the Crown for the use of the public of the Province of Ontario.

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section part thereof. Sub-section 9 of sec. 31 provides that no tolls shall be levied or taken until approved of by the Lieutenant-Governor in council, by order in council, etc. An order in council was passed on the 5th January, 1894, approving of the company's by-law fixing the tolls to be levied for the conveyance of passengers and express.

It was ably argued by Mr. Fraser, on behalf of the company, that clause 32 of the agreement barred or varied sec. 31 of R.S.O. 1887, ch. 170, and that sub-sec. 5* of sec. 171 of the Railway Act, 1906, applied; and therefore the commissioners, and not this Board, had the sole power and authority to fix the company's passenger rates. It will be observed that the agreement of the 4th December, 1891, schedule B to the Act, is only validated; it is not made part and parcel of the company's Act of incorporation. The Legislature said, in effect, "We will validate your agreement, but when it comes to fixing your tolls or passenger rates, sec. 31 of the Railway Act of Ontario will apply—no matter what agreement you make between yourselves, the rates for the conveyance of the public on your railway must be fixed in accordance with sec. 31." If the Legislature had intended that clause 32 of the agreement should vary sec. 31 of ch. 170, it would have said so, and sec. 5 would have read "save as barred, varied, or excepted by the agreement." But the Act does not say that. It says "save as barred, varied, or excepted by this Act."

The conflict is between the agreement and the positive enactment of the statute, and the opinion of the Board is that the statute must prevail. We, therefore, have before us a special Act, not an agreement, providing for the fixing of tolls or passenger fares. Section 171 of the Ontario Railway Act, 1906, provides (1) that "notwithstanding anything contained in any agreement with any municipality or other corporation or person or any provision contained in any special Act to the contrary, the fares to be taken by the company on a railway operated by electricity for each passenger shall not exceed five cents for any distance not exceeding three miles, and where the distance exceeds three miles then not exceeding two cents per mile or fraction thereof for the distance actually travelled."

The Board are of the opinion that sub-sec. 5 of sec. 171 of the Ontario Railway Act, 1906, does not apply in this case, for the

reason that there is no Act or statute which makes the company's tariff of passenger fares subject to the approval of any commissioners, etc., and that we are in no wise bound to consider clause 32 of the agreement, but that we are bound to fix the company's tariff for passenger fares in conformity with sec. 171.

We might also refer to secs. 16 and 17 of the Ontario Railway and Municipal Board Act of 1906, as having a bearing on the question of the Board's jurisdiction. The following statutes may be referred to, in connection with the change from the Niagara Falls Park and River Railway Company to the International Railway Company, but otherwise they have no bearing upon this controversy: statutes of Canada, 1900, ch. 54; 1902, ch. 43; statutes of Ontario, 1901, ch. 86; 1902, ch. 12.

It was suggested by Mr. Ferguson, on behalf of the applicants, that this Board should state a case for the opinion of the Court of Appeal. This we declined to do. We prefer to decide the question involved, as well as we can, so that a concrete cause may be presented to that Court for their determination, rather than what might appear to be an academic question. We are pathfinders, and we prefer to blaze the trail ourselves, rather than ask other people to blaze it for us.

The Board directed that the commissioners of the Queen Victoria Niagara Falls Park should be represented upon the hearing of this application. Sir Æmilius Irving appeared for the commissioners, and very ably stated his views on the question of jurisdiction.

The Board makes no order as to costs, except that the company shall pay \$20 stamps on the formal order.

On the 20th September, 1909, leave was given by the Court of Appeal to the International Railway Company to appeal to the Court of Appeal from the order of the Board.

The appeal came on for hearing on the 25th November, 1909, before MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

F. W. Griffiths, for the Niagara Falls Board of Trade, the respondents, objected that security had not been given by the appellants.

Wallace Nesbitt, K.C., for the appellants, produced a receipt

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shewing that the sum of \$250 had been paid into Court as security on that day, the 25th November.

The appeal was heard subject to the objection.

Wallace Nesbitt, K.C., and *M. Lockhart Gordon*, for the appellants. The Ontario Railway and Municipal Board had no jurisdiction to make the order fixing the passenger rates of the appellants, that power being in the commissioners of the Queen Victoria Niagara Falls Park. The Board made this order under sec. 171 of the Ontario Railway Act, being 6 Edw. VII. ch. 30, regulating passenger fares on electric roads. This section is not applicable to the appellants, as sub-sec. 5 of sec. 171 applies directly to them. It is a geographical description. See *Eastman Photographic Materials Co. v. Comptroller of General Patents*, [1898] A.C. 571, at p. 575. The Act incorporating the Niagara Falls Park and River Railway Co. (the predecessors of the appellants), 55 Vict. ch. 96 (O.), not only gives statutory validity to the agreement, schedule B to the Act, but enacts further, by sec. 4, sub-sec. 1, that the electric railway is to be "operated" in accordance with the terms of the agreement. Clause 32 of the agreement provides that the tariff for passenger fares shall be subject to the approval of the commissioners for the Queen Victoria Niagara Falls Park. The clauses of the agreement containing the terms thereof are in the same position as if those clauses had been enacted in the body of the Act, and clause 32 is, therefore, to be read as if it had been repeated in the form of a statutory section, incorporated in the validating Act. See *Caledonian R.W. Co. v. Greenock and Wemyss Bay R.W. Co.* (1874), L.R. 2 H.L. Sc. 347; *The Queen v. Midland R.W. Co.* (1887), 19 Q.B.D. 540; *Great Western R.W. Co. v. Halesowen R.W. Co.* (1883), 52 L.J.Q.B. 473; *Davis & Sons v. Taff Vale R.W. Co.*, [1895] A.C. 542; *Crosfield & Sons Limited v. Manchester Ship Canal Co.*, [1904] 2 Ch. 123; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1900] 2 Ch. 352. Section 5 of the Act provides that "the clauses and provisions of the Railway Act of Ontario and the amendments thereto save as barred, varied, or excepted by the Act shall form part of this Act." The agreement is in a schedule to the Act, and it is enacted that the company are in the operation of the railway required to fulfil all the terms of the agreement; therefore, such terms must be read as incorporated in the Act and as being enacted in the body of the Act, and are as much a part of the Act as any part of the

Act. See *Attorney-General v. Lamplough* (1878), 47 L.J.Ex. 555; *Caledonian R.W. Co. v. Greenock and Wemyss Bay R.W. Co.*, L.R. 2 H.L. Sc. 347; *The Queen v. Midland R.W. Co.*, 19 Q.B.D. 540. It being specifically enacted in the special Act how the tariff of this company is to be regulated, the provisions of the general Railway Act in this respect, that is sec. 171, are barred, varied, and excepted both by the specific terms of this section of the special Act and by the general rule of construction. Therefore, sec. 171 of the Ontario Railway Act is not applicable to the company's tariff for passenger fares; and, therefore, the order made thereunder was made without jurisdiction.

F. W. Griffiths, for the respondents. The Board had jurisdiction to make the order fixing the passenger rates of the appellants. By sec. 5 of the company's incorporation Act, 55 Vict. ch. 96, sec. 31 of R.S.O. 1887, ch. 170, the then Railway Act of Ontario, was incorporated therein and made part thereof. Sub-section 9 of sec. 31 provides that no tolls shall be levied or taken until approved of by the Lieutenant-Governor in council. On the 1st June, 1906, came into force the Ontario Railway Act, 1906, and the Ontario Railway and Municipal Board Act, 1906. By the new legislation the statutory powers dependent on the will of the Lieutenant-Governor in council are transferred to the Ontario Railway and Municipal Board. The agreement, being schedule B to the Act, is only validated; it is not made part and parcel of the company's Act of incorporation. In regard to fixing passenger rates, sec. 31 of the Railway Act of Ontario applies. If Parliament had intended that clause 32 of the agreement should vary sec. 31 of ch. 170, it would have said so, and sec. 5 would have read "save as barred, varied, or excepted by the agreement," instead of "save as barred, varied, or excepted by this Act." The conflict is between the agreement and the positive enactment of the statute, and the statute must prevail. Sub-section 5 of sec. 171 of the Ontario Railway Act, 1906, does not apply, and clause 32 of the agreement is not to be considered, but the company's tariff for passenger fares must be fixed in conformity with sec. 171.

Nesbitt, in reply.

December 31. Moss, C.J.O.:—Strictly speaking, this appeal was not entitled to be on the list of cases set down for hearing at the November session of the Court, for the sum of \$250 by way of

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security for costs was not paid into Court in time to enable that to be regularly done. But that does not dispose of the appeal. There was nothing to prevent it being set down for the next session. No one was desirous of that delay, it being clearly in the interest of all parties that the appeal should be heard as speedily as practicable. The case was fully and ably argued, and we are now in a position to dispose of it.

The question raised is as to the jurisdiction of the Railway and Municipal Board to compel the appellant company to adopt a tariff of passenger fares in accordance with the rates fixed by sec. 171 of the Ontario Railway Act.

Upon this arises the question whether sub-sec. 5 of that section applies to the appellant company. If it applies, the question of the fares to be taken by the company is unaffected by any part of sec. 171. Incidentally arises the further question whether, sec. 171 being out of the way, the Board has the power, on an application such as was made in this case, to direct what fares the company shall charge.

As appears from the opinion delivered on behalf of the Board, the matter was presented and dealt with as an application to compel the company to comply with sec. 171. And the conclusion of the Board was that sub-sec. 5 did not apply, and that they were bound to fix the company's tariff for passengers' fares in conformity with sec. 171. The Board were also of the opinion that they were in no way bound to consider clause 32 of the agreement between the commissioners for the Queen Victoria Niagara Falls Park and Edmund B. Osler and others, set out as schedule B to the Act 55 Vict. ch. 96. But, for the purpose of determining whether sub-sec. 5 of sec. 171 applied, it was essential to consider clause 32 of the agreement. Sub-section 5 was placed in the Act for some purpose, and it reads almost as if it had been framed with special reference to the company.

Clause 32 of the agreement provides as follows: "The company's tariff for passenger fares shall be a reasonable one, and shall be subject to the approval of the commissioners. . . ."

Sub-section 5 of sec. 171 reads: "This section shall not apply to a company whose tariff for passenger fares is subject to the approval of any commissioners in whom are vested any park or lands owned by the Crown for the use of the public of the Province of Ontario."

Read in connection with clause 32, this appears to be a very accurate description of the appellant company. At all events it is sufficient to comprise the company. Undoubtedly, as between the parties to the agreement, the company's tariff was subject to the approval of commissioners who completely answer the description contained in the sub-section.

It follows that the company is not subject to the provisions of sec. 171 (1), and there is no room for the application to it of the imperative provision that, notwithstanding anything contained in any agreement with any municipal or other corporation or person, or any provision contained in any special Act to the contrary, the fares shall be as therein stated.

It is said that the effect of the incorporation into the company's Act of sec. 31 of the Railway Act of Ontario, R.S.O. 1887, ch. 170, was virtually to abrogate clause 32 of the agreement. But they should, if possible, be read together in such a way as to give effect to both. And reading them as subjecting the company's tariff to the approval of both the commissioners and the Lieutenant-Governor is not inconsistent with the intention of the parties. The tariff remaining subject to the approval of the commissioners, although subject also to the approval of the Lieutenant-Governor or the substituted authority, sub-sec. 5 of sec. 171 continues to exclude it from the operation of that section. And the company does not appear to have done any act which would confer jurisdiction on the Board to entertain the present application by virtue of secs. 16 and 17 of the Ontario Railway and Municipal Board Act of 1906.

The order of the Board from which this appeal is taken must be reversed, but, under the circumstances, without costs.

• MEREDITH, J.A.:—This case has been treated as one affecting the jurisdiction of the Ontario Railway and Municipal Board: but I am by no means sure that it is a case of that character: that depends upon whether the Board acquired jurisdiction by misconstruction of an enactment conferring jurisdiction upon them, or merely misconstrued an enactment in a matter within their jurisdiction; but, as there is a right of appeal to this Court upon any question of law, whether affecting jurisdiction or not, it is quite immaterial whether the questions involved affect, or do not affect, jurisdiction.

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The questions involved present no great difficulty. The main one is whether sub-sec. 5 of sec. 171 of the present Ontario Railway Act applies to the appellants. That sub-section provides that the section shall not apply to a company whose tariff of passenger fares is subject to the approval of any commissioners in whom are vested any park or lands owned by the Crown for the use of the public of the Province of Ontario. Under an agreement made between the applicants and the commissioners of Queen Victoria Niagara Falls Park—commissioners within the meaning of sub-sec. 5—the appellants' tariff for passengers was made "subject to the approval of the commissioners;" and that agreement was, by legislative enactment, approved, ratified, confirmed, and declared to be valid and binding on the parties thereto; though really I do not quite see how it makes any difference, for sub-sec. 5 does not require that the approval shall be under any statute or statute-conferred power.

So far the case seems to me to be a plain one: the case is plainly one within the very words of the sub-section. But it is said that by the enactment confirming the agreement the provisions of the Ontario Railway Act were, with some exceptions, made part of that enactment, including a section providing that no tolls should be levied or taken until approved by the Lieutenant-Governor in council, and published as therein provided: and that is so: but surely it by no means follows that the approval of the commissioners is not also requisite. There is no difficulty in giving full effect to all the provisions of the enactments as well as the agreement. The tariff is subject to the approval of the commissioners, parties to the agreement, in the interests which they specially represent; but it is also subject to higher approval in the interests of the public generally. There is nothing extraordinary or inconsistent in that, and it is a course which seems to have been in part followed; the parties to the agreement must first act, and then the higher power must supervise.

Section 171 is not applicable; but, under sec. 169, besides approval by the commissioners, approval by the Board, now taking the place of the Lieutenant-Governor in council, is required.

I would allow the appeal: but the case, having regard to all that has occurred in it, is not one for costs.

OSLER, GARROW, and MACLAREN, JJ.A. concurred.

[IN THE COURT OF APPEAL.]

REX V. PAILLEUR.

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Criminal Law—Attempt to Commit Incest—Indictable Offence—Criminal Code, secs. 204, 570—Evidence of Children of Tender Years—Canada Evidence Act, sec. 16—Corroboration—Statement or Complaint of Child—Admissibility.

The prisoner was tried upon a charge of having attempted to commit incest with his daughter, a child of seven years of age, and was found guilty:—*Held*, MEREDITH, J.A., dissenting, that, as the evidence shewed that the prisoner had done what he could to commit the crime of incest, sec. 570 of the Criminal Code applied to his case, and he was open to indictment under it.

Per MEREDITH, J.A., that under sec. 204 of the Criminal Code the concurrence of both persons in the wrong is a necessary part of the crime; there cannot be the statutory crime of incest where rape has been committed.

Held, also, MEREDITH, J.A., expressing no opinion, that the evidence of the prisoner's child and of another child of four years of age was properly received, though not under oath, by virtue of the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 16; and that this evidence was sufficiently corroborated by other evidence referred to below.

Held, also, OSLER, J.A., doubting, and MEREDITH, J.A., dissenting, that a complaint or statement made by the prisoner's child to one B., in whose charge she had been placed by her mother, was properly admitted in evidence.

CASE stated for the opinion of the Court by the Junior Judge of the County Court of Carleton.

The following statement of the facts is taken from the judgment of Moss, C.J.O.:—

The prisoner with his own consent was tried before the Junior Judge of the County Court of Carleton, under the provisions of Part XVIII. of the Criminal Code, upon a charge of having attempted to commit incest with his daughter Joliette Pailleur, and was found guilty.

Joliette Pailleur was between seven and eight years of age, and her evidence and that of Bessie Archansky, a child of four years of age, was received, though not given upon oath, the learned Judge being of opinion that they were possessed of sufficient intelligence to justify the reception of their evidence, and understood the duty of speaking the truth.

It was objected on behalf of the prisoner that their evidence was not corroborated in the manner and to the extent required by the enactments governing its admission, but the learned Judge was of the contrary opinion.

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The learned Judge also received in evidence a complaint or statement made by Joliette Pailleur immediately after the offence was alleged to have been committed, it being objected on behalf of the prisoner that the complaint or statement was not made freely and voluntarily, but was the outcome of questions improperly addressed to her by one Richard Berthiaume.*

*In the stated case the County Court Judge set forth the facts as follows:—

The complaint was made under the following circumstances, according to the evidence of Richard Berthiaume. On the afternoon on which the offence is alleged to have been committed, Mrs. Pailleur, the mother of Joliette Pailleur, was not at home; she had gone to work, and had asked Berthiaume to keep her children from running on the street. The accused came home between four and five o'clock, and at once went upstairs. His children were sitting in a little shed near the door. The accused called Joliette Pailleur; she would not go; Berthiaume told her to go upstairs to her father, and she went up. She was upstairs about fifteen or twenty minutes. While the accused and the little girl were upstairs, Berthiaume heard the accused say, "Hurry up, hurry up!" Berthiaume saw Joliette Pailleur when she came downstairs. She came out of the house; she looked like a child that had been crying, she was pulling up her drawers. Berthiaume then says, "I called her and asked her what he did to her." The child's answer was objected to, and, after some discussion and some other evidence had been given, the matter was returned to as follows: "Q. When the little girl came out of the house, who spoke first, you or she? A. It was me. Q. And what did you say to her? A. I asked her what she had done—I saw her fixing her clothes. Q. And what did she answer? A. She said it was her father that took them down. . . . I told her to take care and not tell any lies—to tell the truth. Q. What did she say then? A. She told me what he had done—that he did her some harm. . . . She said, 'he took his body and put it into mine.'" On cross-examination Berthiaume gives this account of how the statement came to be made: "Q. Then you saw the little girl when she came down? A. Yes. Q. Did you tell her not to tell you lies and to tell the truth? A. Yes, sir. Q. Before she spoke to you? A. Yes, sir. Q. You asked her what her father had done to her? A. No, I asked her why she was putting up her pants. She said it was her father that took them off."

It was objected that the evidence of Joliette Pailleur and Bessie Archansky was not corroborated. I considered that it was corroborated by the evidence of Richard Berthiaume, already referred to, as to the children being alone; the accused coming home and calling Joliette Pailleur upstairs to him; the child going up and coming down fifteen or twenty minutes later putting up her drawers; and as to the little Jewish girl, Bessie Archansky, going upstairs while the accused was there with his daughter; by the evidence of Philomene Berthiaume that the girl's parts were red and inflamed, and that her chemise was wet in front; and by the evidence of Dr. Nagle that he had examined the girl on the day after the alleged offence and found slight inflammatory signs around the mouth of the vagina, which might have been caused by an attempt to have sexual intercourse, or by other means. The evidence seems to me also to be corroborated by the admission of the accused to Ethier. Ethier was a witness for the Crown. He said that he was a constable; that he arrested the accused. "I told him what I was arresting him for, and I notified him that anything he would say would be used against him as evidence in this case, and shortly after I asked him what his wife would say when he would do such a thing, and he said he never did that when his wife was at home."

It was also objected that from the nature of the crime of incest there could be no attempt by one person to commit it, and that the indictment or formal charge upon which the trial took place disclosed no indictable offence.

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At the request of counsel for the prisoner the learned Judge stated the following questions for the opinion of the Court:—

1. Was the evidence of Joliette Pailleur and Bessie Archansky, not given upon oath, admissible?
2. Was such evidence corroborated by any other material evidence?
3. Was the complaint or statement made by Joliette Pailleur to Richard Berthiaume admissible?
4. Does the indictment or formal charge disclose an indictable offence?

The case was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A., on the 1st December, 1909.

Gordon Henderson, who defended the prisoner at the trial, was not present at the argument before the Court, but subsequently submitted a memorandum in which he argued against the conviction, on the ground that the evidence of Joliette Pailleur and Bessie Archansky was not given under oath, and that there was not sufficient inquiry made to justify the Court in taking their statements as required by the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 16.* He also argued that the evidence of Berthiaume was inadmissible, as the statement made to him by Joliette Pailleur was not free and voluntary. The following cases were referred to: *Rex v. Armstrong* (1907), 15 O.L.R. 47; *Regina v. Merry* (1900), 19 Cox C.C. 442; *The King v. Bishop* (1906), 11 Can. Crim. Cas. 30.

J. R. Cartwright, K.C., and *E. Bayly*, K.C., for the Crown. The evidence referred to in the first question submitted for the

* 16. In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

2. No case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence.

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opinion of the Court was admissible under sec. 16 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and there was sufficient corroboration by other material evidence as required by sub-sec. 2 of that section: *Regina v. Kiddle* (1898), 19 Cox C.C. 77; *The King v. Osborne*, [1905] 1 K.B. 551. Although an attempt to commit the crime of incest is not specifically referred to in the Code, such an attempt is possible, and is an indictable offence under sec. 570.

December 31. Moss, C.J.O.:—It will be convenient to deal with the questions in the order in which they are stated.

1. At the trial sufficient appeared to lead to the opinion—and the learned Judge acted upon that opinion—that Joliette Pailleur did not fully understand the nature of an oath, and Bessie Archansky was of too tender years to be deemed capable of doing so, and, the learned Judge having satisfied himself that in other respects they answered the requirements of sec. 16 of the Canada Evidence Act, the provisions of which are applicable to all criminal proceedings (sec. 2), their evidence was properly admitted.

2. No doubt the evidence of Joliette Pailleur was in some respects at variance with that of Richard Berthiaume, but in the material particulars of his being present when the prisoner went upstairs and called the girl Joliette to come up to him, of her reluctance to go, of her having ultimately gone and remained for some time, and of her coming back with her clothing in disorder and shewing signs of agitation, there was no substantial contradiction between them. Then there was other evidence as to the condition of her clothing and person and of other facts, every inference from which tended to support the charge she made against the prisoner in her evidence at the trial.

The law does not require that every part of the evidence shall be corroborated, but only that it must be corroborated by some other material evidence: sec. 16 (2). And that requisite appears in this case.

3. The learned Judge, no doubt, accepted the statements made by Richard Berthiaume set out in the case, beginning with the question, "When the little girl came out of the house who spoke first, you or she?"

The questions he deposed to having put to her were such as

might properly be addressed to her by him, having regard to the fact that the girl's mother had in a measure placed her in his charge during her absence. The questions were natural questions, likely to be put under the circumstances by a person in charge, and there is no valid reason for supposing that the answers were not made freely and voluntarily.

4. Upon this question arises the question whether an attempt to commit incest is an indictable offence under the Criminal Code.

By sec. 204 of the Code,* every one who commits incest as therein defined is guilty of an indictable offence and liable to fourteen years' imprisonment.

An attempt to commit the offence is not amongst the cases specially enumerated in the Code. But by sec. 570 it is declared that every one is guilty of an indictable offence and liable to seven years' imprisonment who attempts, in any case not thereinbefore provided for, to commit any indictable offence for which the punishment is imprisonment for life, or for fourteen years, or for any longer term. And sec. 571 makes provision for the case of an attempt to commit an indictable offence for which the longest term of imprisonment is less than fourteen years, where no express provision is made by law for the punishment of such attempt, and provides a term of imprisonment proportioned to the term to be imposed for the offence itself. The policy of the legislation seems to be to provide for the punishment of attempts to commit indictable offences, in addition to the cases where on a trial for an indictable offence the accused may be found guilty of an attempt instead of guilty of the offence itself.

Is it open to doubt that under sec. 570 both the male and female within the prohibited degrees might be prosecuted for attempting to commit incest where the intention was plain, but the final act was frustrated? Then why not one of the parties under similar circumstances?

*204. Every parent and child, every brother and sister, and every grandparent and grandchild, who cohabit or have sexual intercourse with each other shall each of them, if aware of their consanguinity, be deemed to have committed incest, and be guilty of an indictable offence and liable to fourteen years' imprisonment, and the male person shall also be liable to be whipped: Provided that, if the court or judge is of opinion that the female accused is a party to such intercourse only by reason of the restraint, fear or duress of the other party, the court or judge shall not be bound to impose any punishment on such person under this section.

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The principle seems to be that if a person intends to commit an offence and does all that lies in his power towards its committal, he is not excused because some impediment presents itself which prevents his attempt from being successful.

In this case the prisoner might have been prosecuted for an attempt to have carnal knowledge, but is there any reason for saying that carnal knowledge would not have completed the offence of incest on his part?

The prisoner had the intention, the child was a party to his acts, but doubtless only by reason of his restraint and from fear or duress. If there had been accomplishment, and the child's consent could be presumed, the case as regards her would have fallen within the words of the proviso of sec. 204 of the Code.

The prisoner having done what he could to commit the offence of incest, sec. 570 applies to his case and he was open to indictment under it.

The result is that the conviction should stand.

OSLER, J.A.:—I am of opinion that the first, second, and fourth questions submitted by the learned trial Judge in the case reserved by him should be answered in the affirmative, and that the conviction should be affirmed. Though the complete offence of incest seems to involve the consent of both parties, whether the consent of the female was or was not by reason of restraint, duress, or fear of the other party, and was not in the present case committed, yet what was proved to have been done by the accused seems to me to bring him clearly within the danger of sec. 72 of the Code. In Stephen's Digest of the Criminal Law, 5th ed. p. 39, it is said: "An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted;" and sec. 72 enacts that "every one, who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not." I am not satisfied that one party alone may not be guilty of the offence of attempting to commit incest. As I have said, the section of the Code seems to reach such a case, but on the evidence I think it was quite open

to the learned Judge to hold that both were parties, the unfortunate child being under the restraint, fear, or duress of the accused.

As to corroboration, I think the evidence of the child was corroborated by the evidence specially referred to and relied upon by the learned Judge. He does not seem to have relied at all or acted upon the evidence of the statements made by her to Berthiaume. Had he done so, I should have felt considerable doubt whether the conviction ought to stand, because her complaint, if she can be said to have made a complaint at all, was not, in my opinion, voluntarily made within the meaning of the authorities: *The Queen v. Lillyman*, [1896] 2 Q.B. 167, and *The King v. Osborne*, [1905] 1 K.B. 551. Whether a statement made by the party in relation to the attempt to commit or commission of the offence of incest, assuming that consent is material, can be given in evidence in corroboration, on the principles laid down in those cases, as it may in cases of rape or cases where consent is not material, I should doubt, but it is not here necessary to decide the point, and I therefore do not answer the third question.

As to the first question, it was for the Judge to decide whether the conditions existed under which the evidence of the infants was admissible, though not given under oath, as provided by sec. 16 of the Canada Evidence Act. That question must, therefore, be answered in the affirmative.

MACLAREN, J.A.:—The Junior Judge for the County of Carleton, holding County Judge's Criminal Court, found the accused guilty of an attempt to commit incest with his daughter Joliette, aged seven years and seven months, but reserved four questions for this Court:—

First, whether the evidence of the said Joliette Pailleur and of another girl aged four years taken, though not under oath, should have been received. R.S.C. 1906, ch. 145, sec. 16, provides that such evidence may be received if the child, in the opinion of the Judge, does not understand the nature of an oath, but, in his opinion, is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. In this case the Judge has given his opinion to the above effect on both points, so that the question should be answered in the affirmative.

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The second question is whether there was in this case sufficient corroboration of such evidence. Sub-section 2 of sec. 16 referred to above provides that no case shall be decided upon such evidence alone, but must be corroborated by some other material evidence. The words "other material evidence" in this particular section do not appear to have been judicially construed; but they do not, in my opinion, differ substantially from other statutory provisions regarding corroborative evidence. In sec. 1002 of the Criminal Code the corroboration must be "in some material particular by evidence implicating the accused;" in sec. 1003 the words are "by some other material evidence in support thereof implicating the accused;" while in secs. 10 and 11 of the Ontario Evidence Act the expression is simply "by some other material evidence." Under these sections it has been held that corroboration is not required on all material points or issues; that it is sufficient if there be corroboration in some material respect that will fortify and strengthen the credibility of the main witness, and justify the evidence being accepted and acted upon if it is believed and is sufficient: see *Rex v. Dawn* (1906), 12 O.L.R. 227; *Parker v. Parker* (1881), 32 C.P. 113; *Green v. McLeod* (1896), 23 A.R. 676; *Cole v. Manning* (1877), 2 Q.B.D. 611.

In my opinion, the evidence of Richard Berthiaume, Philomene Berthiaume, Bessie Archansky, and Dr. Nagle (notwithstanding minor contradictions, which were for the County Judge) is more than sufficient to meet the requirements of the statute, and this question should be answered in the affirmative.

The third question is as to whether the statement of Joliette to Richard Berthiaume was admissible. The statement was made immediately after the commission of the alleged offence, but it was objected that it was not voluntary but in answer to questions. The questions asked in this case were perfectly natural and not of a leading or inducing or even of a suggestive character, and were not objectionable or alone sufficient to exclude the statement: *The King v. Osborne*, [1905] 1 K.B. 551, at p. 556. See also *Rex v. Kiddle*, 19 Cox C.C. 77. This question should also be answered affirmatively.

The last question is whether the formal charge disclosed an indictable offence. The ground of objection is that, as the offence requires the consent of two persons, there cannot be an attempt

by one person to commit it. I cannot see the force of this objection. If it were well founded, then an indictment of one person in such a case without joining the other in the same indictment would be bad.

No doubt, to justify a conviction for an attempt to commit a crime there must be some overt act in part execution, but falling short of actual consummation, and possessing the elements of the substantive crime. Mere preparation with incitement or inducement is not enough: *Regina v. Cheeseman* (1862), L. & C. 140; *Regina v. Eagleton* (1855), 6 Cox C.C. 559.

I am unable to see why the offence of an attempt could not be committed where the female is an idiot or lunatic, but the case falls short of rape on account of failure to give evidence of want of consent, as in the case of *Regina v. Connolly* (1867), 26 U.C.R. 317, or *Regina v. Fletcher* (1866), 10 Cox C.C. 248.

Again, why may it not be committed where the female may have at first consented, but, after some overt act, has withdrawn her consent and prevented the consummation of the offence? Or where an unexpected physical obstacle in the female has prevented the penetration required by sec. 7 of the Code in such a case? Or where the completion of the offence is only prevented by the unexpected intervention of a third party?

It has long been the law that in common law offences where the consent of two parties is necessary, an attempt by one of them to perform the prohibited act is punishable. As to an attempt to commit bribery, see *Rex v. Vaughan* (1769), 4 Burr. 2494; *The King v. Plympton* (1725), 2 Ld. Raym. 1377; *Wade v. Broughton* (1814), 3 Ves. & B. 172.

Of course, the evidence required in a case like the present would have justified a conviction for an indecent assault, but I do not think that the prosecution is on that account limited to the minor offence.

The Code not having made any special provision for an attempt to commit the crime of incest, and the punishment for incest being imprisonment for fourteen years or more, this case comes under sec. 570, which provides that every one is guilty of an indictable offence and liable to seven years' imprisonment who attempts, in any case not thereinbefore provided for, to commit any indictable

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offence for which the punishment is imprisonment for fourteen years or more.

Attention has been called to the fact that, while special provisions have been made in the Code for the punishment of an attempt to commit certain crimes, there is no such provision regarding incest. To my mind, the explanation is that most of such provisions were adopted prior to 1892. In the Code of that year, secs. 570 and 571 appeared as sec. 528, to make uniform provision for such cases, without repealing the varying penalties and provisions that had been made for special cases.

I am of opinion, consequently, that the fourth question should also be answered in the affirmative.

GARROW, J.A., concurred.

MEREDITH, J.A.:—The one charge against the prisoner was that he “did unlawfully attempt to cohabit and have sexual intercourse with” his own daughter, a child between seven and eight years of age.

Several questions have been reserved; but, in the view I take of the case, it is necessary to consider one only of the points upon which the learned County Court Judge had doubt, and upon which he seeks enlightenment from this Court.

The crime of which he has, upon the evidence, found the accused guilty, was unquestionably an attempt to commit rape, or “have carnal knowledge of a girl under the age of fourteen years not being his wife;” a crime which, in my opinion, could not, in this country, include the crime of incest.

Incest is not a crime at common law; but it is, in Canada, a crime under the enactment called the Criminal Code: see sec. 20.4

Under that section the concurrence of both persons in the wrong is, in my opinion, a necessary part of the crime. There cannot be the statutory crime of incest where rape has been committed. The section throughout indicates that: those are guilty “who cohabit and have sexual intercourse with each other;” and each of them, if aware of the consanguinity, shall be deemed to have committed the crime of incest. How is it possible to apply these words to this case? The proviso does not weaken this view of the enactment; indeed, it strengthens it; for, although, under the circumstances set out in it, the Court or Judge “shall not be

bound" to impose any punishment upon the female, she is not made guiltless of the crime. It being admitted that the consent of each of the persons, to the immoral act, is necessary to constitute the crime of incest, how is it possible that there could be an attempt to commit that crime when, as here, one of the persons was incompetent, by reason of her tender years, to consent, or become a party to the crime? See the Criminal Code, secs. 17, 18, 294, 301, and 302; *Regina v. Vamplew* (1862), 3 F. & F. 520; and *The Queen v. Barratt* (1873), L.R. 2 C.C.R. 81. There is no evidence of any actual consent, of any kind, on the part of the child; the contrary clearly appears.

The fourth question, though inaccurately put, is plainly intended to cover this point; that is made very plain in the statement of the case:—"It was also objected that the crime of incest must be necessarily committed with the consent of two persons, and that from the nature of the crime there could not be an attempt, by one person to commit it; and that the indictment or formal charge in charging an attempt disclosed no indictable offence."

If all this be so, then the fourth question should be answered in the negative, and the prisoner should be discharged; though it may be only "out of the frying pan into the fire"—putting him upon trial for the graver offence.

In regard to the third question, I may add that, as the charge was one of incest, I fail to understand how statements made by one who must have been a consenting party to the crime, if committed, could be evidence, as if the case were one of rape.

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REX v. ELLIS.

Criminal Law—Vagrancy—Criminal Code, sec. 238 (1)—Gaming—Betting.

The defendant, being charged with vagrancy, admitted that he made his living, for the most part, by betting on horse races in the streets, having no fixed place for taking bets or paying them:—

Held, that he could not, upon this admission, be convicted as a vagrant under sec. 238 (1) of the Criminal Code.

“Gaming” in clause (1) does not include betting.

CASE stated by one of the police magistrates for the city of Toronto, as follows:—

“The defendant was charged before me, upon the information of David Archibald, chief inspector of police of Toronto, that he was on the 17th day of September, 1909, a vagrant, contrary to the form of the statute, namely, the Criminal Code of Canada, but pleaded ‘not guilty.’ Counsel in his behalf admitted that he took personal bets on horse races with different individuals in the streets of Toronto, having no fixed place for taking the said bets or paying them; that the defendant made his living, for the most part, thereby, having no other business; that he took these bets with individuals in his own behalf, and, if they won, he himself paid the bets.

“I found the defendant guilty of being a vagrant within the Criminal Code of Canada. I therefore submit the following question for the opinion of this honourable Court: ‘Upon the above admissions, could the defendant be convicted as a vagrant under sec. 238, clause (1),* of the Criminal Code?’ ”

The case was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A., on the 1st December, 1909.

T. C. Robinette, K.C., for the defendant. The question for decision is whether or not the defendant is a “vagrant” within the meaning of sec. 238 (1) of the Criminal Code. It is admitted that he made most of his living by betting on horse races in the street, but this is not “gaming” within the meaning of the statute.

E. Bayly, K.C., for the Crown. The section of the Code under

* 238. Every one is a loose, idle or disorderly person or vagrant who,—
 (1) having no peaceable profession or calling to maintain himself by, for the most part supports himself by gaming or crime, or by the avails of prostitution.

which the defendant was convicted does not speak of "unlawful gaming," but of "gaming" in general, and reference to the standard dictionaries shews that "gaming" includes betting: see Century Dict., p. 2448, *sub voce* "gaming."

Robinette, in reply, referred to sec. 235 (2) of the Code, which permits betting between individuals.

December 31. OSLER, J.A.:—To press the terms of a penal statute beyond the fair, usual, and popular meaning of the terms employed, does not tend to beget or promote respect for the law, but the contrary. I think no one would ordinarily speak of or describe the mere taking of personal bets with individuals on horse races as "gaming." In more than one section of the Code the Legislature has pointed to the distinction; *e.g.*, secs. 226, 227, relating to common gaming houses and common betting houses; sec. 234, obtaining money by gambling with cards, dice, or like devices in a railway car, etc.; sec. 235, keeping premises for the purpose of recording bets or wagers or a device or apparatus for doing so, etc.

If a man is to be punishable as a loose, idle, or disorderly person or vagrant because he makes his living, for the most part, by making bets with individuals on horse races, we must find it to be so enacted. It may be desirable that this should be, but it is not yet, the law.

I have no doubt that the defendant ought not to have been convicted. The question must, therefore, be answered in the negative, and the conviction quashed.

MEREDITH, J.A.:—This conviction cannot be sustained.

The charge against the accused was vagrancy, in "having no peaceable profession or calling to maintain himself by," but, "for the most part," supporting "himself by gaming. . . ."

The conviction is based entirely upon the admission of the accused, that he made his living, for the most part, by betting on horse races. There was no sort of admission, or evidence, of "gaming."

Gaming, and betting on horse races, are different things; and the difference between them, under the Criminal Code, is marked, as secs. 226 and 227 shew; the one is aimed against gaming, the

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other against betting, in the manner dealt with in them; and all of the provisions of the Criminal Code, touching the subject, indicate the intention of Parliament to steer clear of making mere betting a crime: see sec. 235 especially.

Having regard to the language employed in the sections of the Code to which I have referred, as well as to the language of sec. 228, it seems plain to me, that, if it had been intended to make such things as the accused admitted he had done a crime such as he was accused of, the vagrancy section of the Criminal Code, in the part from which I have quoted, would have, in conformity to other sections I have referred to, had added to it the words, "or betting," after the word "gaming." If this were not so, there would have been a great waste of energy in "barking up the wrong tree" in such cases as *Saunders v. The King* (1907), 38 S.C.R. 382.

I would answer the question in the negative; and direct that the accused be discharged.

MOSS, C.J.O., GARROW and MACLAREN, J.J.A., concurred.

[IN THE COURT OF APPEAL.]

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WEBB v. BOX.

Appeal—Application for Leave to Appeal—Order of Divisional Court—Grounds of Appeal—Illegal Distress—Recovery of Double the Value of Goods Distrained—R.S.O. 1897, ch. 342, sec. 18 (2).

The Court of Appeal refused an application by the defendants for leave to appeal to that Court from the judgment of a Divisional Court, 19 O.L.R. 540, the case not presenting any good ground for treating it as exceptional, and allowing a further appeal; the amount actually involved being under \$500; and the question of law not appearing to be a matter of sufficient doubt to justify prolonging the litigation.

OSLER and MEREDITH, J.J.A., discussed the points decided by the Court below, viz., the right to recover double the value of the goods distrained or sold under 2 W. & M., sess. 1, ch. 5, sec. 4, and the effect of changing the words "shall and may" in the original enactment to "may" alone in R.S.O. 1897, ch. 342, sec. 18, sub-sec. 2; and considered that there was no plausible reason for saying that the judgment of the Court below was wrong.

MOTION by the defendants for leave to appeal to the Court of Appeal from the judgment of a Divisional Court, 19 O.L.R. 540, reversing in part the judgment of TEETZEL, J.

The motion was heard by MOSS, C.J.O., OSLER, GARROW, MAC-LAREN, and MEREDITH, JJ.A., on the 29th November, 1909.

J. C. Makins, for the defendants. Leave to appeal from the decision of the Divisional Court should be granted, as the legal question involved is an important one, and there is no reported case upon it under the Ontario statute R.S.O. 1897, ch. 342, sec. 18 (2), which replaced the Imperial Act 2 W. & M., sess. 1, ch. 5, sec. 4, under which all the reported cases were decided. The action is in effect a penal one, and the Court can exercise its discretion under sec. 57 (3) of the Judicature Act. He referred to *Jones v. Jones* (1889), 22 Q.B.D. 425, 58 L.J.Q.B. 178, and *Hobbs v. Hudson* (1890), 59 L.J.Q.B. 562.

C. A. Masten, K.C., and *W. R. Wadsworth*, for the plaintiff. The difference between the Imperial statute and the Ontario statute is merely a verbal variation, as held in the Court below, and was not intended to effect any change in the law. The other point, that the statute is penal and not remedial in its nature, is scarcely arguable in view of the authorities: *Stanley v. Wharton* (1821), 9 Price 301.

Makins, in reply, referred to *Goodison Thresher Co. v. Township of McNab* (1908), 12 O.W.R. 775, in which leave to appeal had been granted in a somewhat similar case.

December 31. MOSS, C.J.O.:—Upon consideration, it does not appear to me that the case is one presenting any good ground for treating it as exceptional and allowing a further appeal.

The amount actually involved is under \$500, and the question of law does not seem to be a matter of sufficient doubt to justify prolonging the present litigation.

The application is refused with costs.

OSLER, J.A.:—I am of opinion that leave to appeal should be refused.

In the Act of 2 W. & M., sess. 1, ch. 5, sec. 4, the words "shall and may" have long been held to confer the absolute right to recover as damages double value of the goods distrained and sold. Less than that could not be given: *Masters v. Ferris* (1845), 1 C.B. 715.

As now consolidated and re-enacted in the 3rd volume of the Revised Statutes of Ontario, 1897, ch. 342, sec. 18 (2), the words

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“shall and” have been dropped, so that the section reads “may, by action . . . recover double of the value of the goods or chattels so distrained or sold.” And the contention is that the effect of the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7 (2), is that the word “may” must be construed as permissive only, and therefore that the absolute right to recover double value no longer exists.

It has, however, more than once been pointed out that this clause of the Interpretation Act does not introduce any new Rule, but is declaratory only of that established by judicial decision: *Re Lincoln Election* (1878), 2 A.R. 324, *per Moss*, C.J.A., at p. 341; *In re Township of Nottawasaga and County of Simcoe* (1902), 4 O.L.R. 1, 15. And in *Maxwell on the Interpretation of Statutes*, 4th ed. (1905), pp. 371-2, it is said: “Whenever a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having a right to make the application; and the exercise depends, not on the discretion of the Courts or Judges, but upon proof of the particular case out of which the power arises:” *Macdougall v. Paterson* (1851), 11 C.B. 755.

In *In re Burton and Blinkhorn*, [1903] 2 K.B. 300, it was held that sec. 32 of the Solicitors Act, 1843, 6 & 7 Vict. ch. 73 (Imp.), which enacts that a solicitor “shall and may be” struck off the roll for certain offences, does not give the Court a discretion to impose any less punishment; and this was the construction given to the same expression in the Imperial statute now consolidated and re-enacted, with the omission of the words “shall and,” as already pointed out.

The 9th section of the Act (2 Edw. VII. ch. 13) respecting the Acts so consolidated in the 3rd volume of the Revised Statutes, expressly enacts that the statutes so revised shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law contained in Acts and parts of Acts repealed, and for which the Revised Statutes are substituted; and, having regard to the rule of construction above referred to, it is impossible to hold that the provision of the Revised Statute in question is not in effect the same as that of the repealed section of the Act of W. & M.

There is, therefore, in my opinion, no plausible reason for saying that the judgment of the Court below is wrong.

MEREDITH, J.A.:—The right—under the statute 2 W. & M., sess. 1, ch. 5—to damages, in double the value of the goods distrained and sold, has never, as far as I am aware, been heretofore questioned, though actions for the recovery of such damages are not of very uncommon occurrence.

The sympathies of some Judges have been moved and expressed in hard cases, such as where the landlord acted in good faith and under a reasonable but mistaken belief that the rent distrained for was really due and in arrear: see *Brown v. Blackwell* (1874), 35 U.C.R. 239; and it has been held that unless the damages are expressly claimed under the statute, actual damages only should be awarded: *Williams v. Thomas* (1894), 25 O.R. 536; but no case going further has been referred to; and, if any cases had gone further, they could not overrule the statute.

So that, apart from the point in regard to the change in the wording of the enactment, in its “revision and consolidation” in R.S.O. 1897, vol. III., there could be no question as to the plaintiff’s right to such damages in this action.

The original enactment provided that the owner of goods distrained and sold for rent when in truth no rent was due, “shall and may” recover, from the person distraining, double the value of the goods. In the “revised and consolidated” enactment, the words “shall and” are omitted, and the word “may” alone is retained. There are a number of other verbal changes which go to shew the reason for, and purpose of, the change in question.

In the revision and consolidation of enactments it is sometimes a rather dangerous thing to alter ancient words for merely more grammatical, or more graceful, expression. Expressions and words long in use may mean more, or adjudications may have attached to them a meaning greater, than is apparent to one having an eye only to the artistic or to rules of grammar. But in this case I cannot see that any mischief has been done, that any substantial change has been made; nor can it well be imagined that the revisers contemplated any such change; that those who were charged with the ordinary “revision, classification, and consolidation” of a large body of ancient laws, because some had “become

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obsolete," or had "in effect" been superseded by subsequent legislation, and some "were enacted in Latin or Norman French, or in language which has become antiquated and obscure," should, without calling marked attention to it, by the mere dropping of two words, which might be considered superfluous, make a radical change in an important part of the law which had been in existence for so many years, without the constitutional law-makers having shewn any disposition to change it.

The other changes, to which I have referred, as well as the scope of the revisers' duties and the manner in which the change was made, point very directly, if not quite conclusively, to the leaving out of the words in question because they were deemed superfluous merely. Not a word has been added: the words "where in truth" have been changed to "when in truth," making no sort of difference in meaning, though perhaps conforming more to that which would be said in these days; the other changes are the dropping out of words solely because deemed superfluous; the words thus omitted are "by virtue or colour of this present Act," "or persons" after person twice, "or them" after him, "or names" after name, "as aforesaid" twice, "that then," "of trespass or upon the case" after action, and "any or either of them, his or their executors or administrators."

The words in question are, the owner may recover, not that the Court may in its discretion award, or the jury assess, double value; and the effect is, as it always has been, that, if the plaintiff choose by action to properly claim such damages, he is, by virtue of the enactment, entitled to them, if his case come within its provisions.

The words "shall and may" recover were likewise governed by "the owner;" and perhaps meant no more than shall be entitled to and may recover "double value."

The words "shall and may" were not of quite uncommon occurrence in earlier days, and in Acts of Parliament and otherwise were said to be obligatory or not according to the subject matter with respect to which they were used: see *Rex v. Bailiffs and Corporation of Eye* (1822), 1 B. & C. 85; and the difficulties arising from the use or misuse of the words "shall" and "may" have always abided, and no doubt shall still abide, with us. But such difficulties do not arise in this case, as they might if it were the Court or jury which, not the plaintiff who, "shall and may"

or "shall" or "may." In the 3rd section of the enactment in question "shall" alone is used, though, so far as the "person grieved" is concerned, it can have no greater effect than the word "may." In 11 Geo. II. ch. 19, sec. 19, the words are "shall or may," and it is very obvious that they were not intended to give any discretion to Judge or jury; see secs. 15 and 17, ch. 342, R.S.O. 1897.

It is, however, contended that "double value" is a forfeiture or penalty against which the Courts can relieve: the Judicature Act, sec. 57, sub-sec. 3, and sec. 30. But, if that were so, again, it would be extraordinary that no such relief has hitherto been granted, or sought, in such a case.

Forfeiture seems to me to be out of the question; and, if a penalty, it is surely not such an one as the Courts should or can relieve from. How could the principles upon which the Courts grant relief from penalties or forfeitures be applied to such a case?

In granting extraordinary power to a creditor, without the intervention of any judicial or other public officer, to enforce payment of his debt by the sale of his debtor's goods, it was seen fit to safeguard that power from misuse by giving a right of action in which the damages would be double the value of the goods sold for every misuse of it, if the person wronged saw fit to enforce such right of action. It is in no sense a mere penalty for the enforcing of something which the wrongdoer can yet make good, and which is in substance that which was intended to be ensured. Take away the double value damages, and the owner of the goods has absolutely nothing under the statute, for he could always have had his action for actual damages. So that to take away the right to double value is to repeal the statute; that is, of course, if, under it, the owner has, as I consider he has, the statutory right of action with the consequent damages; that it is not a matter in the discretion of Judge or jury. But, apart from these considerations, what power has the Court to relieve from even a penalty imposed by statute: see *Keating v. Sparrow* (1810), 1 Ball & B. 367: except under R.S.O. 1897, ch. 108?

I would refuse the application.

GARROW and MACLAREN, JJ.A., concurred.

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KENT V. OCEAN ACCIDENT AND GUARANTEE CORPORATION.

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Apr. 29.

Dec. 31.

*Accident Insurance—Disability—Payment of Claim for Short Period—
Receipt—Injuries Subsequently Developing from same Accident—
Permanent Disability—Terms of Policy—Liability Confined to one
Claim.*

An accident insurance policy was issued by the defendants to the plaintiff, and was in force on the 3rd September, 1907, when the plaintiff was injured in a railway accident. Provision was made in the policy for the payment of varying amounts depending upon the nature and extent of the injury. On the 17th December, 1907, the plaintiff, believing that he would speedily recover from the effect of his injury, sent in a claim for eight weeks' total and four weeks' partial disability. The claim was admitted by the defendants, and they at once sent the plaintiff a cheque for \$425, which he accepted. He signed a receipt for the \$425, "in final settlement of my claim, including double liability, under policy No. 64276, for injuries received on the 3rd day of September, 1907, and I hereby acquit and discharge the (defendants) from all and any further claims under said policy which I have or may hereafter have as a result of said injuries." The plaintiff on the 9th October, 1908, made a claim for permanent disability arising from the same railway accident, the defendants first having had notice of this on the 18th June, 1908; and this action was brought to recover the amount of that claim. Being examined as a witness, the plaintiff admitted that in making the settlement of December, 1907, he intended to make and believed he was making a full and final settlement of all claims against the defendants arising out of the accident. He believed that he had substantially recovered from its serious consequences, and that, if he had continued to recover as he was recovering when he received the cheque, there would have been nothing further about it. He said he did not read the receipt which he signed, and in this he was believed by the trial Judge.

Some of the terms of the policy were: that the defendants should not be liable for more than one claim on account of any one accident; that the entire amount payable to and claimed by the assured should be ascertained and admitted before any part thereof was paid; that the amount so paid should be in diminution of the total amount insured in case of a subsequent claim in the same year; and that notice of the injury should be given within twenty-one days after the accident, and particulars of the claim sent within two months of the time when the same became a claim within the meaning of the policy:—

Held, MEREDITH, J.A., dissenting, that the plaintiff was not entitled to recover.

Judgment of CLUTE, J., reversed.

ACTION upon an accident insurance policy. The facts are stated in the judgments.

The action was tried before CLUTE, J., without a jury, at Orangeville, on the 15th April, 1909.

C. R. McKeown, K.C., for the plaintiff.

G. T. Blackstock, K.C., for the defendants.

April 29. CLUTE, J.:—The plaintiff is an insurance inspector, and at the time of the accident when he received the injuries complained of was insured under a policy of the defendant company.

On the 3rd September, 1907, while a passenger on the Canadian Pacific Railway, travelling from Orangeville to Toronto, the plaintiff received the injuries complained of as a result of an accident on the railway at what is known as the "Horse Shoe" near Caledon. He returned the same evening to Orangeville, and did not consider himself injured to any serious extent. In his evidence he says: "I was thrown against the car. When I got out I thought I was going to be all right. When I reached home I did not feel seriously injured. I first noticed that I was injured at Brampton two or three days after. The first intimation I had at Brampton was that I lost control of my hand at table; I could not take supper. I seemed to recover on my way home. I consulted Dr. Henry, who advised rest, and I did take rest for some time. I could do work to some extent. Trying to perform work set me back."

The plaintiff somewhat improved, but still he was unable to do any work for some eight weeks, and then he began to improve. On the 17th December following the accident, he put in a claim for insurance under the policy in question, which contains this statement of his injuries and its result :—

"On the 3rd day of September, 1907, at 9.30 a.m., I was on the train C.P.R. and wrecked on the Caledon Mountain. I was on third car from the rear and second of train. I was thrown with force against the car seats, and received injuries which did not develope for some time afterwards, and upon medical examination I found that I suffered from spinal and brain concussion. As the direct result of such accidental injury I have been confined to the house for eight weeks. I was wholly and entirely disabled and prevented by such injuries from performing any and all of the business of my occupation for eight weeks—from the 19th September to the 18th November, 1907. I first began after my injury to attend to some part of the business of my occupation on the 18th day of November, 1907, and was partially disabled and prevented by such injuries from performing some one or more necessary daily duty or duties pertaining to the business of my occupation for four weeks—from the 18th November, 1907, to the present day of December, 16th, 1907."

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On the 26th December the defendants wrote the plaintiff as follows: "We are in receipt of your proof of claim in this case for eight weeks' total and four weeks' partial disability, and hand you herewith our cheque for \$425 in settlement of your claim. The total indemnity is double in accordance with the terms of the policy, but the partial indemnity is not. Trusting you will find this satisfactory, I desire to remain," etc. The letter is signed by the general manager.

The plaintiff acknowledged receipt of the cheque on the 31st December, in the following words: "I duly received yours of the 26th inst., with cheque enclosed in settlement of my claim, with thanks for your prompt settlement."

The cheque upon its face was in the usual form for \$425. Upon the back was the following receipt: "I hereby acknowledge by my indorsement of this cheque to have this day received the sum of \$425 in final settlement of my claim, including double liability, under policy No. 64276, for injuries received on the 3rd day of September, 1907, and I hereby acquit and discharge the Ocean Accident and Guarantee Corporation, Limited, from all and any further claim under said policy which I have or may hereafter have as a result of said injuries."

This was signed by the plaintiff in the presence of a witness. The plaintiff said that he signed this document in a formal way, but did not read it over, and did not notice at the time that it was a release of his entire claim. He took it to be an ordinary receipt. He further stated that at the time he did not know the extent of his injuries; that he thought he was sufficiently recovered to go on and do his business. Since the signing of the receipt, instead of improving, he has become worse. From the date of the receipt to the 14th April, 1908, the plaintiff was partially disabled; and from the 14th April, 1908, to the 3rd September, 1908—twenty-one weeks and about five days—the plaintiff was totally disabled and incapacitated from work. There is no question of fraud in this case; both parties acted *bonâ fide*; the plaintiff, supposing that he was on a fair way to recover, and that the amount claimed would in that case be a reasonable compensation under the policy, put in his claim for injuries, which was promptly paid by the defendants without question.

In his examination for discovery he says that he did not see

any agent of the company at all in respect to the claim; that he represented himself; that immediately after the 17th December he started to work.

"Q. I suppose you knew at the time you got payment from the company the total amount of the claim had to be arrived at?

A. I suppose, yes.

"Q. And that was your intention in making the claim as you did? A. That was my intention, yes.

"Q. Fixing the duration of the partial disability and the duration of the total disability? A. Yes.

"Q. And then asking the company for payment of that amount? A. Yes.

"Q. Then they did pay you the amount you asked? A. Yes."

With reference to the receipt he says:—

"Q. You never read it over? A. No. I supposed it was a settlement of the claim and I accepted it as that.

"Q. But you understood what you were signing? A. A receipt in full.

"Q. As you told me before, you made up your claim shewing the duration of the partial disablement and the duration of the total disablement? A. Yes.

"Q. In order to get a settlement from the company? A. Yes.

"Q. And you have already told me, when you signed this cheque you signed it as a receipt in full to the company? A. I considered it that.

"Q. What do you say now about having read the back of the cheque before you signed it? A. I do not think I did. I think I just signed it the same as I would any ordinary cheque without ever looking at it.

"Q. Now, then, let us go back to the 13th December. At that time you had made up your mind that your injuries had ceased? A. Yes, I thought they had.

"Q. And that you were recovered? A. Yes.

"Q. And then you made your claim to the company? A. Yes.

"Q. To get the money? A. Yes.

"Q. And when they sent you a cheque you thought it was a settlement in full? A. Yes, I did.

"Q. And that is the way it was accepted by you? A. Well, you can call that an acceptance by me in that way.

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"Q. You thought it was a settlement in full? A. I thought I was well."

I find as a fact upon the plaintiff's evidence, which I believe, that he did not read the receipt, but signed it supposing it to be in the usual form. I find further that at that time it was not in the plaintiff's mind to make a further claim. He intended to and did accept the same in full of his injuries up to that time, not supposing that in the future there would be any ill-effects to be suffered by him from his injuries. Perhaps what took place in respect of his claim against the Canadian Pacific Railway Co. will illustrate his condition of mind at this time. He was just about signing a settlement with them for \$400, when, finding that he did not improve, he withdrew from the negotiations and brought an action, which was settled by that company paying him \$4,000.

I find as a fact that at the time of said payment to the plaintiff he supposed that he had recovered from his injuries and would be able to continue his business as an insurance inspector, and that it was in such belief that said payment was accepted. The question of further injury from the accident was not, I think, present to his mind, and did not enter into consideration in signing the receipt.

In *Rideal v. Great Western R.W. Co.* (1859), 1 F. & F. 706, the receipt was in the following form: "Received of the Great Western Railway Co. the sum of £20 in full satisfaction of the injuries arising from the accident of the 31st ultimo, and all consequences arising therefrom." In that case the collision took place on the 31st January, and a receipt was sent on the following day. Except some bruises there were no external injuries. The medical evidence, however, was strong to shew that he had sustained serious and permanent injuries which afterwards developed themselves. Erle, C.J., in charging the jury, said: "The question for you will be, whether the plaintiff's *mind* went with the terms of the receipt. The plea is, that the plaintiff accepted the money in satisfaction for the 'grievances *complained of*,' *i.e.*, the injuries now proved to have been sustained. In terms the receipt which he signed no doubt supports that plea. Did his *mind* go with those terms? Was he aware of their import and effect at the time he signed? If, as he declares, he did not *read* the receipt, and supposed it was a mere *receipt*, it is clear that he did *not* so agree. But, on the

other hand, if he *did* read it, being a man of business, he must be taken to have *understood* it, and it *expressly* included future and consequential injuries. No doubt a man might well be ready to take a certain sum in satisfaction of such injuries as he was sensible of, which would not be any equivalent for serious and permanent injuries. Still if, in fact, a man has done so, he is bound by his bargain. No improper practice has been proved, nor does it appear that the company's servants took any unfair advantage of the plaintiff. The question, therefore, simply is, did his *mind* go with the terms of the paper which he signed, and was he aware of its effect?"

In *Lee v. Lancashire and Yorkshire R.W. Co.* (1871), L.R. 6 Ch. 527, a passenger, who was injured by a railway accident, sent in a claim for £691 compensation. The traffic manager of the company called upon him, and after some discussion the passenger accepted £400, and gave a receipt acknowledging it to be in full discharge of his claims. About a year afterwards he commenced an action against the company for further compensation, to which the company pleaded that he had accepted £400 in full satisfaction and discharge of the causes of action. The plaintiff filed his bill to restrain them from relying on the plea, and from setting up the acceptance of the £400 or the receipt as a satisfaction or discharge of the damages, except to the extent of £400. The bill did not allege fraud, but that the plaintiff had signed the receipt on the express condition that he should not thereby exclude himself from further compensation if his injuries turned out more serious than was supposed at the time. It was held that, as the statement in the receipt could be rebutted by evidence that the plaintiff did not receive the money in full satisfaction of all demands, the whole case could be tried at law better than in equity; and that the bill ought to be dismissed. In the judgment of Mellish, L.J., it is pointed out that where the release is not under seal, it does not amount to a discharge of the causes of action altogether, but is merely evidence of satisfaction and liable to be rebutted by contrary evidence, and reference is made to *Skaije v. Jackson* (1824), 3 B. & C. 421; *Graves v. Key* (1832), 3 B. & Ad. 313; *Bowes v. Foster* (1858), 2 H. & N. 779; and also *Roberts v. Eastern Counties R.W. Co.* (1859), 1 F. & F. 460. In *Bowes v. Foster* reference is made to the case of *Alner v. George* (1808), 1 Camp. 392, where

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Lord Ellenborough said that a receipt in full was an estoppel; and Martin, B., states that that case is not law; that "the distinction between a receipt and a release has been long established. The fast of a release must be pleaded and put on record. A receipt cannot be pleaded in answer to the action; it is only evidence on a plea of payment; and where a defendant is obliged to prove payment, a document not under seal is no bar as against the fact that no payment has been made." Quoting this language of Martin, B., and dealing with the question there involved, and holding that the matter could be well tried at law under the plea, Mellish, L.J., quotes the language of Erle, C.J., in his charge to the jury in the *Rideal* case, and proceeds: "That, I apprehend, if this case is tried at law, will be the precise question the Judge ought to leave to the jury. Did his mind go with this receipt, and did he understand and know at the time that he was accepting it in full satisfaction and discharge?" James, L.J., also held that the giving of the receipt did not estop the plaintiff from saying that there was no accord and no satisfaction.

Where a release is general in its terms, the Court will limit its operation to matters contemplated by the parties at the time of its execution: *Lyall v. Edwards* (1861), 6 H. & N. 337; *Begg v. Toronto R.W. Co.* (1905), 6 O.W.R. 239; *London and South Western R.W. Co. v. Blackmore* (1870), L.R. 4 H.L. 610, where Lord Westbury, at p. 623, says: "The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given."

Pomeroy in his book on Equity Jurisprudence, 2nd ed., vol. 2, sec. 839, defines mistake to be "a mental condition, a conception, a conviction of the understanding—erroneous indeed, but none the less a conviction—which influences the will and leads to some outward physical manifestation."

Story (Eq. Jur. 110) defines mistake as "some unintentional act, omission, or error arising from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence."

Kerr on Frauds and Mistakes, 3rd ed., p. 430, adopts this definition.

In *McCarty v. Houston and Texas Central R.W. Co.* (1899), 21 Tex. Civ. App. 568, the Court of Appeal held, in a case very

similar to the present, that the plaintiff was not bound by a former release under seal, on the ground of mistake, where it subsequently developed that there were other and much more serious injuries that were not known or considered at the time of the release. Gill, J., who gave the judgment of the Court, in part says, after disposing of other matters involved in the appeal: "There is, however, considerable evidence tending to shew that the alleged injuries to appellant's spine and bowels were unknown to the parties connected with the transaction, and that these graver and more permanent injuries were not taken into consideration by any party to the settlement. That appellant signed the release under a mistake as to the real situation in this regard, and could not have been induced to sign had these other injuries been known to him, has equal support in the testimony. This being true, the question arises, can a release couched in terms broad enough to cover all personal injuries growing out of a particular accident be avoided on the ground of mistake?" After referring to *Lyall v. Edwards*, 6 H. & N. 337, he proceeds: "We can see no logical reason why the principle thus applied to releases affecting property may not be applied with equal force and justice to claims like the one under consideration. The right involved is certainly valuable, and to the appellant was perhaps more important than any other in his possession. The cases in which the rule has been so applied are not numerous, and, so far as we know, the question whether it can properly be done has not been adjudicated in this State." He then refers to *Lumley v. Wabash R. Co.* (1896), 6 Am. & Eng. R.R. Cas. N.S. 81, and a number of other cases, including *Roberts v. Eastern Counties R.W. Co.*, 1 F. & F. 460, where the plaintiff, who had been injured in a railway accident, accepted £2 for injury to his clothes, not supposing that he had been hurt. He went to his usual business, but soon began to suffer great pain, and it was then ascertained that he had been more seriously injured than he had at first conceived. Cockburn, C.J., said: "It surely cannot be seriously urged that if the plaintiff had been seriously injured he is precluded from recovering because he agreed to accept £2 for his hat." This case is cited in 1 Cyc., p. 308, with American cases, for the proposition that accord and satisfaction does not operate as a bar in regard to matters not contemplated by the agreement.

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What, then, was in the contemplation of the parties at the time this settlement took place? That, I think, can only be gathered from what took place between the parties prior to the settlement, and that consisted simply of the two facts, as far as the settlement was concerned, namely, the sending in of the claim of the plaintiff, and the payment of that claim.

Now, it will be seen on an examination of the claim that it is a claim for a definite number of weeks, and not a claim for his injuries, whatever they might be, more or less; and the letter enclosing the cheque treats it as such. It does not, in short, cover future injuries; and I find as a fact that the plaintiff did not intend to accept the payment in respect of loss of time arising in future from the effects of the accident. That question was not contemplated by him, and it would further seem from the subsequent correspondence that it was not contemplated by either of the parties.

On the 19th May, 1908, the plaintiff's wife wrote to the company as follows: "Policy No. 27476. Mr. Kent has been laid up for some few weeks, and Dr. James Henry attending. The Doctor will give you all facts concerning the case." The company replied to this on the 29th: "In answer to your letter of recent date advising that this insured has been laid up for some weeks, we are, without prejudice, handing you herewith blank form for further particulars. You will please see that the same is completed in detail and returned to us as soon as possible." To which Mrs. Kent again replied on the 30th May, stating that "Mr. Kent is still under the Doctor's treatment, so cannot fill out the enclosed blank. Dr. Henry will advise you from time to time."

On the same date the company wrote to Dr. Henry, who was attending the plaintiff, stating that "W. R. Kent, of Orangeville, holds a policy in this corporation, and he has notified us that he is disabled and under your care, and has referred us to you for further particulars. Would you be good enough therefore to advise me (1) the date of the commencement of his disability (Ans.—commencing 14th April, 1908); (2) the nature and extent of his disability (Ans.—hemiplegia right side); (3) the probable length of his disability (Ans.—cannot say; he has improved very much the last few weeks); (4) his present condition (Ans.—able to be out and walk moderately well, yet unsteady and drags the leg a little)."

The company on the 3rd June replied that the report was not full enough, and on the 8th June Dr. Henry replied, giving fuller particulars. On the 12th June the company's surgeon wrote the plaintiff stating: "Your notice of disability has been placed before me. Your medical attendant's report of your disability states that you suffer from hemiplegia of the right side, and this he will, no doubt, advise was due to hæmorrhage of the brain. Your disability was the result of a diseased artery, and not the result of an accident, and we regret to have to advise you that your policy does not cover you from your recent disability." On the 15th June, 1908, the plaintiff received a further letter, stating that, "in accordance with paragraph 8 of the conditions, we are cancelling the above policy, and beg to advise you that the same is void and of no force or effect from this date. Enclosed find cheque for \$9.04, being pro rata unearned portion of the premium. Please acknowledge receipt and return policy at your earliest convenience."

Paragraph 8 of the policy provides, amongst other things, that "the corporation may cancel this policy at any time by offering to refund said premium less a *pro rata* share for the time it has been in force."

There is a further letter from Mrs. Kent, giving also fuller particulars of the accident.

A cheque was sent to the plaintiff for the unearned premium on the 15th June, which was returned to the defendants, and again returned to the plaintiff on the 23rd June, and sent back to the defendants on the 25th June. No further correspondence took place until the 19th October, when the first reference is made to the settlement and cheque of the 26th December, in which it is then stated that the company holds "his complete and final discharge under the policy as a result of the accident referred to. Under the circumstances we do not see why we should be called upon to open the case at this date." There is further correspondence between the plaintiff's solicitor and the defendants, which, on this branch of the case, is not very material.

I infer from this correspondence, above quoted, that both parties regarded the policy as still in existence and the claim as still open. The company treated the case as one in which there might or might not be a valid claim. It is difficult to understand why, if they relied upon the release for further injuries resulting

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from the accident, not contemplated or covered by the previous payment, they did not state so during the correspondence. It confirms my view that neither the plaintiff nor the defendants understood or contemplated that the payment made and the receipt given was for anything else than the matters covered by the claim which was sent in. There was no accord or satisfaction or settlement of any further claim. Nor do I think the defendants are entitled to set up the form of the receipt as a bar to the plaintiff's action, for the reasons above indicated. That the plaintiff is suffering and has suffered from serious ill-effects from the injuries, which were not contemplated or taken into consideration at the time of the settlement, is, I think, beyond doubt; and for this he is entitled to recover. The cancellation of the policy on the 15th June does not affect his right to recover . . . for the effects of an injury which occurred while the policy was in force.

Under clause 5, the plaintiff is entitled to recover for fourteen weeks at \$12.50 a week (\$175), having been paid for the previous twelve weeks during which he was either totally or partially disabled. He is also entitled to recover from the 14th April to the 3rd September, 1908, or twenty-one weeks and five days, at the rate of \$50 a week, making \$1,085, or a total of \$1,260, with costs of action.

From this judgment the defendants appealed to the Court of Appeal, and the appeal was heard on the 14th and 15th October, 1909, by MOSS, C.J.O., OSLER, MACLAREN, GARROW, and MEREDITH, JJ.A.

H. E. Rose, K.C., for the appellants, contended that the respondent was bound by the settlement and receipt, which he intended should be a full and complete satisfaction of the liability of the appellants under the policy; and that, under the terms of the policy, the plaintiff was not entitled to any further payment. He relied on *Lee v. Lancashire and Yorkshire R.W. Co.*, L.R. 6 Ch. 527; *Holland on Jurisprudence*, 10th ed., p. 310; *Begg v. Toronto R.W. Co.*, 6 O.W.R. 239, at p. 241; *Smith v. Hughes* (1871), L.R. 6 Q.B. 597, at pp. 606, 607. He referred to and distinguished *Rideal v. Great Western R.W. Co.*, 1 F. & F. 706; *Lyll v. Edwards*, 6 H. & N. 337; *London and South Western R.W. Co. v. Blackmore*, L.R. 4 H.L. 610; *McCarty v. Houston and Texas Central*

R.W. Co., 21 Tex. Civ. App. 568; *Lumley v. Wabash R. Co.*, 6 Am. & Eng. R.R. Cas. N.S. 81.

C. R. McKeown, K.C., for the respondent. The mind of neither the appellants nor the respondent went with the alleged settlement or receipt as a final discharge, or as a release of liability for the claim sued upon, and it could not, therefore, be binding upon either party: *Ellen v. Great Northern R.W. Co.* (1901), 17 Times L.R. 453; *Doyle v. Diamond Flint Glass Co.* (1905), 10 O.L.R. 567; *Clough v. London and North Western R.W. Co.* (1871), L.R. 7 Ex. 26; *Ryckman v. Hamilton Grimsby and Beamsville Electric R.W. Co.* (1905), 10 O.L.R. 419; *London and South Western R.W. Co. v. Blackmore*, L.R. 4 H.L. 610. General words in a release are limited to the matters which were especially in the minds of the parties when the release was given: *Lyall v. Edwards*, 6 H. & N. 337, 30 L.J. Ex. 193; *Lindo v. Lindo* (1839), 1 Beav. 496; Am. & Eng. Encyc. of Law, 2nd ed., vol. 24, p. 304; *McCarty v. Houston and Texas Central R.W. Co.*, 21 Tex. Civ. App. 568; *Haist v. Grand Trunk R.W. Co.* (1894), 26 O.R. 19.

December 31. GARROW, J.A.:—Appeal by the defendants from the judgment at the trial before Clute, J., who found in the plaintiff's favour.

The action was brought to recover compensation under an accident insurance policy issued by the defendants to the plaintiff for injuries sustained by the plaintiff on the 3rd September, 1907, while a passenger upon the Canadian Pacific Railway.

Provision is made in the policy for the payment of varying amounts depending upon the nature and extent of the injury, upon which nothing further need be said at present.

The contract also contains the following provisions:—

“Provided always, and it is hereby, as the essence of the contract, agreed as follows:— . . .

“In case the assured becomes entitled to weekly compensation, the liability of the corporation shall be deemed to be satisfied when the wound or injury shall have healed as far as possible, although some permanent or other injury may still remain to the assured, and the corporation shall not be liable for more than one claim on account of any one accident, nor to claims for injuries due directly or indirectly to any physical impairment or weakness the result of any previous injury.

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“(2) The entire amount payable to and claimed by the assured under this policy shall be ascertained and admitted by the corporation before any part thereof is actually paid, and such entire amount shall be accounted as in diminution of the total amount assured, so that in case of a subsequent claim hereunder in the same year, the assured shall not be entitled to recover more in all than the maximum hereby assured (or half the maximum as the case may be), and weekly sums shall be payable in one sum upon the adjudication of the claim. . . .

“(6) In the event of an accident or illness covered by this policy occurring to the assured, full particulars thereof and of the injuries sustained or nature of illness must, without delay, be sent to the corporation, at their head office in Montreal, with a statement that the assured or his legal representatives intend to make a claim thereunder, and if such be not received by the corporation within twenty-one days after the occurrence of the accident or illness, no claim under the within policy will be allowed. As soon as possible after any accident or illness, proper medical advice must be procured and followed on the part of the assured, and it is expressly stipulated that the corporation shall not be liable for any consequences arising by reason of failure to procure and follow such advice. . . .

“In every case the medical or other agents of the corporation shall be allowed to examine the person of the assured when and so often as the same may be reasonably required on behalf of the corporation. The form of claim supplied by the corporation shall be filled up and returned, including a certificate or certificates of the medical attendant of the assured to be furnished at the expense of the assured. . . . In all cases of accident or illness unless notice shall have been given as aforesaid and detailed particulars of claim delivered to the corporation within two months of the time when the same became a claim against the corporation within the meaning of the policy, the corporation will not be liable for any payment under this policy.”

The defendants were duly notified under these provisions of the accident, and injury, and intention to make a claim. Thereupon they, through their surgeon as he is called, opened correspondence with Dr. Henry, the plaintiff's physician, who gave them full particulars of the nature of the injury. On the 22nd November, 1907, the surgeon wrote to Dr. Henry, saying: “It is now

about five or six weeks since I heard from you regarding your patient Mr. W. R. Kent, and I would be pleased if you would be good enough to advise me as to his present condition, whether he is totally disabled or not, and if so how long it will be before he will be able to return to his duties." To which, on the 5th December, 1907, Dr. Henry replied: "I am pleased to say Mr. Kent is greatly improved. . . . I think now with care he will be all right in time, and is willing to have the matter settled between self and your company; consequently send in the necessary claim papers, and the matter may be closed up at once."

To this the defendants replied on the 9th December, 1907: "Dr. Elliott has handed us your letter of the 5th inst. . . . As requested we are handing you herewith proof for making claim, and would ask you to please hand the same to Mr. Kent as soon as possible, as we are not aware of his present address. We are glad to hear that Mr. Kent is now recovered from the effects of the accident, and await the receipt of the proof at an early date."

The formal claim papers were accordingly filled up by or on behalf of the plaintiff, upon the forms so supplied by the defendants, the date of the oath being the 17th December, 1907, and returned to the defendants, who on the 26th December, 1907, wrote to the plaintiff: "We are in receipt of your proof of claim in this case for eight weeks' total and four weeks' partial disability, and hand you herewith our cheque for \$425 in settlement of your claim. The total indemnity is double in accordance with the terms of the policy, but the partial indemnity is not . . ." To which, on the 31st December, 1907, the plaintiff replied: "I duly received yours of the 26th inst., with cheque enclosed in settlement of my claim, with thanks for your prompt settlement I remain . . ."

Upon the back of the cheque was printed a receipt as follows: "I hereby acknowledge by my indorsement of this cheque to have this day received the sum of \$425 in final settlement of my claim, including double liability, under policy No. 64276, for injuries received on the 3rd day of September, 1907, and I hereby acquit and discharge the Ocean Accident and Guarantee Corporation, Limited, from all and any further claims under said policy which I have or may hereafter have as a result of said injuries.

"Claimant sign here.

(Sgd.) "W. R. KENT.

"Witness (sgd.) J. HUMPHREY."

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The plaintiff signed this in presence of a witness, and passed the cheque to his credit at his bank. And thus the matter seemed to be completely at an end. And so it remained, so far as the defendants were informed, until a letter dated the 19th May, 1908, from the plaintiff's wife, was received announcing that the plaintiff "has been laid up for some few weeks, and Dr. James Henry attending. The Doctor will give you all facts concerning the case." There was nothing stated in this letter to indicate that the illness was alleged to be connected with the accident of the 3rd September, 1907. And apparently in the belief that it was not, the defendants, on the 29th May, 1908, without prejudice, sent blank form to be filled up giving further particulars. On the same day they also wrote Dr. Henry, to whom they had been referred by Mrs. Kent, for particulars, which was answered by Dr. Henry at once, stating the date of the commencement of the disability to be the 14th April, 1908, its nature, hemiplegia, right side, probable duration of disability—"Can't say. He has been improved very much the last few weeks—present condition, able to go out—can walk moderately well, yet unsteady and drags the leg a little."

To the letter enclosing the blank form Mrs. Kent replied that the plaintiff was still ill and unable to fill out the form. To which the defendants replied on the 3rd June, 1908, that "the form was not by any means the final proof of claim, but a report that we require in every case as soon as possible after the happening of the accident, as without the information which this form properly completed would give us we are unable to determine the seriousness of the injury or the date upon which it happened. . . ."

On the 12th June, 1908, the defendants wrote to the plaintiff stating that: "Your notice of disability has been placed before me (the surgeon). Your medical attendant's report . . . states that you suffered from hemiplegia of the right side, and this he will no doubt advise you was due to hæmorrhage in the brain. Your disability was therefore the result of a disease of the arteries, and not the result of an accident, and we regret to have to advise you that your policy does not cover your recent disability."

On the 15th June, the defendants, under a clause in the policy, cancelled it and sent a cheque for unearned premium. On the

18th June the plaintiff's wife again wrote, and then for the first time distinctly claimed that the then recent disability had its origin in the accident of the 3rd September in the previous year, and returned the cheque for the unearned premium. And on the 23rd June the defendants returned the cheque and insisted on the cancellation, but the cheque was again returned to them in a letter of the 25th June.

And so the matter apparently rested until the 9th October, 1908, when the plaintiff's solicitor wrote making a demand of \$300 a year as for permanent disability, again ascribing as the cause the original accident; to which on the 23rd October the defendants replied setting up the former settlement and declining to re-open the case.

The plaintiff admitted, when called as a witness at the trial, that in making the settlement of December, 1907, he intended to make and believed he was making a full and final settlement of all claim against the defendants arising out of the accident of the 3rd September, 1907. He believed that he had substantially recovered from all its serious consequences, and that, if he had continued to recover as he was recovering when he received the cheque, there would have been nothing further about it. He said he did not read the printed matter which he signed on the back of the cheque, and in this he was believed by the learned Judge.

When examined for discovery the plaintiff had said:—

"Q. I suppose you knew at the time that to get payment from the company the total amount of the claim had to be arrived at?

A. I suppose, yes.

"Q. And that was your intention in making the claim as you did? A. That was my intention, yes.

"Q. Fixing the duration of the partial disability and the duration of the total disability? A. Yes.

"Q. And then asking the company for payment of that amount? A. Yes.

"Q. Then they did pay you the amount you asked? A. Yes.

"Q. But you understood what you were signing? A. A receipt in full.

"Q. And you have already told me, when you signed this

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cheque you signed it as a receipt in full to the company? A. I considered it that."

That the plaintiff was mistaken in his too favourable estimate of his condition must now be assumed, there being no evidence to the contrary of that of Dr. Henry, who at the trial stated that the "stroke" of the 14th April and what followed should properly be ascribed to the original accident. And the question is, can the plaintiff, under the circumstances, recover, notwithstanding the settlement? Clute, J., after very fully stating the facts and the law, says: "Neither the plaintiff nor the defendants understood or contemplated that the payment made and the receipt given was for anything else than the matters covered by the claim which was sent in. There was no accord or satisfaction or settlement of any further claim." Earlier in his judgment he had said: "What, then, was in the contemplation of the parties at the time this settlement took place? That, I think, can only be gathered from what took place between the parties prior to the settlement, and that consisted simply of the two facts, as far as the settlement was concerned, namely, the sending in of the claim of the plaintiff, and the payment of that claim. Now, it will be seen on an examination of the claim that it is a claim for a definite number of weeks, and not a claim for his injuries, whatever they might be, more or less; and the letter enclosing the cheque treats it as such. It does not, in short, cover future injuries; and I find as a fact that the plaintiff did not intend to accept the payment in respect of loss of time arising in future from the effects of the accident. That question was not contemplated by him, and it would further seem from the subsequent correspondence that it was not contemplated by either of the parties." Which two extracts perhaps sufficiently indicate the general point of view held by the learned Judge in directing judgment for the plaintiff.

I am, with deference, unable to agree with the statement that what both parties intended was merely to settle for the particular items set forth in the claim without reference to the future. The account had to be itemized, because what was claimed was a weekly indemnity, and even the plaintiff admits, in the extracts from his evidence which I have quoted, that he intended to give and understood he was giving a receipt in full of his whole claim arising out of the accident. From that position he very honestly

makes no attempt in his evidence to escape, his whole case resting upon this, that such receipt in full should not be binding because he afterwards discovered that he was not as fully recovered as he thought he was at the time of the settlement.

The receipt (whether he read it or not is of no consequence, for if he did not read it he should have done so), of course, creates no estoppel, but is merely evidence of an agreement: see *Ellen v. Great Northern R.W. Co.*, 17 Times L.R. 453. But the case does not, I think, in any degree turn upon its exact terms. The plaintiff's claim is based upon a written or printed contract, binding upon both parties, whereby the defendants agreed, for a stated premium, to insure him from the injurious consequences of accident, upon certain clearly stated terms. Some of such terms were, as more fully set out in the extracts before quoted, that the defendants should not be liable for more than one claim on account of any one accident, that the entire amount payable to and claimed by the assured should be ascertained and admitted before any part thereof was paid, and that the amount so paid should be in diminution of the total amount assured in case of a subsequent claim in the same year.

Notice of the injury was required to be given within twenty-one days after the accident, and particulars of the claim itself were to be sent within two months of the time when the same became a claim within the meaning of the policy, that is, as I read it, within two months after the total disability which the plaintiff intended to claim had occurred. And my difficulty is to see how, in the face of these provisions, relief can be given to the plaintiff because he prematurely sent in his claim. He knew of the terms of his policy, a knowledge which under the circumstances would in any event be properly imputed to him. He intended to comply, and to make only the one final claim, and to give a receipt in full. He need not have sent in his claim when he did. He was under no compulsion to do so. He could at least have waited for the two months allowed after the claim had matured. He and his medical adviser were the judges of when that period had arrived. They both knew, as the evidence shews, that the recovery was not complete on the 16th December, 1907. And the plaintiff must have known that in sending in his claim then he was taking the risk of the anticipated full recovery turning out to be ill-founded.

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Unfortunately these provisions in the contract appear not to have been called to the attention of the learned Judge, or at all events are not discussed in his judgment. But, in my opinion, they, and not the receipt, form the real barrier in the plaintiff's way, a barrier which to me seems insurmountable unless we are to disregard the contract altogether.

Reference is made in the judgment to the subsequent correspondence between the parties; but not, as I understand it, as supporting a waiver by the defendants of any kind, which it clearly would not do. And if it would not do that, it is, in my opinion, of no consequence.

For these reasons the appeal should, in my opinion, be allowed and the action dismissed, both with costs.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., agreed in allowing the appeal.

MEREDITH, J.A.:—The respondent being entitled to so much per week from the appellants so long as his disability lasted, but not exceeding fifty-two weeks, and payable only in one sum, when the payments ceased by reason of recovery or expiry of the full period, and, thinking that he had recovered, accepted from the appellants the amount of such weekly payments up to the time of his supposed recovery, and gave a very comprehensive receipt for the payment. Subsequently it turned out that there had been no real recovery, and that the respondent's condition was such that the liability, under the terms of the contract, should, and would, have been continued, without any sort of objection, but for the payment so made.

The respondent sued in this action to recover the subsequent dues, and the one defence to the claim is that payment. But how can that be set up to claims that were not, and never were intended to be, covered by it? No payment of any sort was made in respect of the dues now sued for, nor was any sort of release of them intended to be given; that could not have been, because under a mutual mistake of fact, all the parties thought that no right to any of them would ever arise. There was no sort of compromise of possible future rights or claims, nor any sort of consideration given for relieving the appellants from them. It is true that, but for such mutual mistake, the respondent would not so soon

have been paid anything under the contract; but, if the appellants have lost anything by that, it can be made good in adjusting the amount really coming to the respondent.

If A. agree to pay B. a shilling a week as long as C. lives, to be paid in one sum at C.'s death; and if B., believing that C. had died, receives payment under the agreement, and even if he give the most solemn release, under that mistake, could it be said that B. would have no further right in law or in equity? There is no difference in principle between such a case and this case. It seems to me to be the clearest kind of a case in which equity would relieve on the ground of mutual mistake; though in this case there might be no need to seek relief in Chancery. In an action at common law, upon the covenant, what defence could the appellants successfully plead? Payment might not do; nor accord and satisfaction. And even a release under seal would be ineffectual in equity, there being no difficulty in putting the parties in substantially the same position as if no mistake had occurred: see *Beauchamp v. Winn* (1873), L.R. 6 H.L. 223.

Of course, if the respondent had taken the chances of the future, if he had accepted the early payment in satisfaction of all future rights, he would be bound; but that was not this case: the payment was made, and accepted, under the mutual mistake of fact that no future payment would accrue.

Though for very different reasons, I agree with the trial Judge in considering that the respondent is entitled to recover the balance of the weekly payments, but would make that subject to an allowance to the appellants of any loss they may have sustained through the premature payment.

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PRINGLE V. CITY OF STRATFORD.

(TWO ACTIONS.)

July 13.

Dec. 31.

Assessment and Taxes—Exemption of Factories—Powers of City Corporation—By-laws—Validating Statutes—Contracts—Construction—"Exemption from Taxation"—General Acts—Special Acts—Mandamus—Declaratory Judgment—Remedy by Appeal to Court of Revision.

By two Acts of the Ontario Legislature, 62 Vict. ch. 82 and 63 Vict. ch. 98, the council of the city of Stratford were authorised to pass by-laws and enter into agreements with two manufacturing companies, whereby the companies were "to be given exemption from taxation" for the lands and premises whereon their buildings were to be erected, for a period of *twenty* years. When these special Acts were passed, the Municipal Act in force provided (sec. 411) that a municipal council might by by-law exempt any manufacturing establishment in whole or in part from taxation, *except as to school taxes*, for any period not exceeding *ten* years; and sec. 73 of the Public Schools Act then in force provided that no by-law for exempting any portion of the ratable property of a municipality from taxation in whole or in part should be held or construed to exempt such property from school rates of any kind whatsoever:—

Held, MEREDITH, J.A., dissenting, that, in the absence of anything to shew that in the special Acts the words "exemption from taxation" were intended to have a larger meaning and to exclude the exception, it should be considered, in accordance with the settled principle of construction, that the Legislature did not intend to do more than to alter the general law in so far as it was necessary to permit a longer period of exemption than by that law the council could grant, or to abandon the settled policy in respect of school rates since 1892; and therefore were liable to pay school rates in respect of the property exempted by the special Acts.

Canadian Pacific R.W. Co. v. City of Winnipeg (1900), 30 S.C.R. 558, and *Regina ex rel. Harding v. Bennett* (1896), 27 O.R. 314, distinguished.

The plaintiff, on behalf of himself and the other ratepayers of the city, brought this action against the city corporation and the two companies for a mandamus compelling the city corporation to assess, levy, and collect from the companies school rates, as well for the past as for the future years of the twenty-year period, and for a declaration that the city corporation were in future bound to collect them:—

Held, OSLER, J.A., doubting, that, while the plaintiff had a remedy by appeal to the Court of Revision, that was not his only remedy; and he was entitled to a declaration of the true meaning and construction of the documents under which the exemptions were claimed.

In the circumstances, the measure of relief was a declaration applicable to the future only.

Judgment of MACMAHON, J., varied.

ACTIONS by a ratepayer of the city of Stratford, suing on his own behalf, and also on behalf of the other ratepayers of the city, against the Corporation of the City of Stratford, the Whyte Packing Co., and the George McLagan Furniture Co., for a mandamus compelling the defendants the city corporation to assess, levy, and collect from the defendant companies proper school taxes from

the time of the incorporation of the companies to the time of the commencement of the actions, and for a declaration that the city corporation were in future bound to do the same.

The facts are stated in the judgments.

The actions were tried together before MACMAHON, J., without a jury, at Stratford, on the 15th and 16th June, 1909.

J. W. Curry, K.C., and *J. C. Makins*, for the plaintiff.

R. S. Robertson, for the defendants the city corporation.

G. G. McPherson, K.C., for the other defendants.

July 13. MACMAHON, J.:—The Legislature of Ontario, on the 1st April, 1899, passed an Act (62 Vict. ch. 82), intituled “An Act to confirm By-law No. 779 of the City of Stratford.”

The preamble to the Act recites that the Whyte Packing Co. had represented that they had entered into an agreement set out as schedule A to said Act, first having passed by-law No. 779 of the said city of Stratford. Clause 12 of the agreement, on which the question raised by the plaintiff turns, reads: “The parties of the second part (the Corporation of the City of Stratford) agree that the said company are to be given exemption from taxation for the said land and premises whereon are to be erected the said buildings, plant and machinery if and so long as they will have employed continuously for a period of at least ten months in the year at least fifty men . . . to be continued for a period of twenty years from the first day of January next preceding the giving of the said guarantee. . . .”

In the year 1900 an Act was passed by the Legislature (63 Vict. ch. 98), intituled “An Act to enable the City of Stratford to guarantee for \$30,000 to be borrowed by George McLagan.” The Act recites that the municipal corporation, being desirous of granting assistance to George McLagan in re-establishing his business of a furniture manufacturer in said city of Stratford, had duly submitted a by-law to a vote of the ratepayers, set out in a schedule to the Act, and said by-law was carried by a large majority of the ratepayers qualified to vote on money by-laws; and then follow recitals why the said by-law should be confirmed by the Legislature. And clause 11 of the agreement in schedule B to the Act provides that “the parties of the second part” (the City

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of Stratford) "agree that the said company are to be given exemption from taxation for the lands and premises whereon are to be erected the said buildings, plant and machinery, and the said buildings, plant and machinery if and so long as they will have employed continuously for a period of eleven and one-half months in the year for the first year ninety men, for the second year one hundred and twenty men, and for the third and succeeding years one hundred and fifty men, residing in each case in the city of Stratford, in the carrying on of the said business, to be continued for a term of twenty years," etc.

It was not questioned that the respective companies had carried out the provisions of the respective Acts of the Legislature as to the number of workmen to be employed by each company.

The question in each case is: Do the words in the respective Acts "the said parties of the second part" (the City of Stratford) "agree that the said company are to be given exemption from taxation," include exemption from "school rates" as well as the ordinary municipal taxes.

The Public Schools Act, R.S.O. 1897, ch. 292, sec. 73, provides that "no by-law passed by any municipality after the 14th day of April, 1892, for exempting any portion of the ratable property of a municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind whatsoever."

In Maxwell on Statutes, 3rd ed., p. 113, the author says: "One of these presumptions is that the Legislature does not intend to make any alteration in the law beyond what it explicitly declares, either in express terms or by implication; or, in other words, beyond the immediate scope and object of the statute. In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used. General words and phrases, therefore, however wide and comprehensive in their literal sense, must be construed as strictly limited to the actual objects of the Act, and as not altering the law."

Such a stringent prohibition as is contained in sec. 73 of the Public Schools Act, preventing a municipality from passing a by-law exempting property from school rates, cannot have escaped the attention of the Legislature in passing the Acts in question, in which no expression exists to alter or override the general law.

There is nothing in the petitions presented to the Legislature, recited in the Acts, asking to exempt the property of either company from "school rates;" and the general words of both Acts, "to be given exemption from taxation," must, according to the canon of interpretation referred to, be construed as limiting the exemption to such taxes as the municipality had the power of exempting; and the city had no power to exempt the companies from the payment of school rates.

As the council for the municipality of the city of Stratford evidently thought that the Acts referred to exempted the two defendant companies from the payment of "school rates," and the assessors have in consequence refrained from assessing the companies for all the years between the passing of the respective Acts by the Legislature and the present year, it is too late, after the assessors' and collectors' rolls have been returned for all the years prior to the present, to order a mandamus to issue for the assessment of the former years. The plaintiff is, however, entitled to the order requiring the City of Stratford to assess and levy from the two defendant companies the school rates for the present year and the succeeding years.

The defendants must pay the costs as on a summary application for a mandamus.

I grant the plaintiff liberty to appeal as to the question of costs.

There were appeals by the defendants and cross-appeals by the plaintiff from the judgment of MACMAHON, J.

The appeals and cross-appeals were heard on the 14th October, 1909, by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

G. G. McPherson, K.C., for the defendant companies. The words "exemption from taxation" in 62 Vict. ch. 82, schedule A, clause 12, and in 63 Vict. ch. 98, schedule B, clause 11, passed by the Legislature to ratify an agreement entered into between the

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City of Stratford and the defendant companies and a by-law of the said city include exemption from school rates, notwithstanding the provisions of the Public Schools Act, R.S.O. 1897, ch. 292, sec. 73. There is no admission or evidence that the defendant companies are public school supporters. The plaintiff is not entitled to bring the action, not at least until he has first called upon the school board to bring it, and they have refused: *The Queen v. Frost* (1838), 8 A. & E. 822. This exemption was one of the things the Legislature was petitioned for. The Legislature would not be asked to ratify the doing of something which the municipality had the power to do. School taxes are levied upon property, not upon persons or corporations, yet it was not proved at the trial that the defendant companies owned any property, taxable or otherwise. See 4 Edw. VII. ch. 23, sec. 5; 1 Edw. VII. ch. 39, sec. 71; 9 Edw. VII. ch. 89, sec. 47. The rule of construction established by the Public Schools Act, R.S.O. 1897, ch. 292, sec. 73, is not applicable to other enactments of the Legislature. The agreement in question is part of the statute 63 Vict. ch. 98, and is to be construed according to the same rules as any other statute: *Attorney-General v. Lamplough* (1878), 3 Ex.D. 214, at p. 229. The terms of the agreement are plain and express in giving exemption from taxation, and should be given their full effect: sec. 8, sub-sec. 41, of the Interpretation Act. Similar words in the Assessment Act, 4 Edw. VII. ch. 23, sec. 5, have always been construed as extending to school taxes: *Regina ex rel. Harding v. Bennett* (1896), 27 O.R. 314.

R. S. Robertson for the defendants the Corporation of the City of Stratford. These defendants are not properly before the Court. They have not committed any breach of duty. The proper forum for the plaintiff was the Court of Revision. The Legislature was asked to ratify the exemption from taxation; so it ought to be assumed that the Legislature knew about the particulars of the exemptions wanted, among which was the exemption from school rates. If property is not taxable for municipal rates, it cannot be taxable for school rates: R.S.O. 1897, ch. 292, sec. 67; 4 Edw. VII. ch. 23, sec. 5. The agreement, being a schedule to the Act, is a part of the Act, and the language used in the agreement is the very language the Legislature uses when it means exemption from all taxation. Where the Legislature omits words from one Act,

which have been used in another, they intend a difference: *Mullins v. Collins* (1874), L.R. 9 Q.B. 292, at p. 295; *Union Bank of London v. Ingram* (1882), 20 Ch. D. 463; *Attorney-General v. Sillem* (1863), 2 H. & C. 431, at p. 515. In the Act ratifying the agreement, all mention of school rates is omitted.

T. J. W. O'Connor and *J. C. Makins*, for the plaintiff. In view of the general law in respect of exemption from taxation existing at the time when the validating Acts 62 Vict. ch. 82 and 63 Vict. ch. 98 were passed, prohibiting exemption from school rates, the validating Acts ought not to be construed as giving the companies such exemption. The Legislature only intended to exempt them from the operation of such parts of the general law as are specifically mentioned in the agreement referred to in the validating Acts. In the construction of statutes there is a presumption that the Legislature does not intend to make any alteration in the law beyond what it explicitly declares: Maxwell's Interpretation of Statutes, 3rd ed., p. 113, and cases there cited. As to considering the surrounding circumstances, see Beal's Cardinal Rules of Legal Interpretation, 2nd ed., pp. 279, 281, 282. Subsequent legislation is not construed to interfere with prior, without words of repeal, unless there be a contrariety or repugnancy between them: Beal's Cardinal Rules, p. 471. The plaintiff is in the proper forum, as he is asking for a declaration of right. "Exemption from taxation," in this case, is not meant to include school rates. *Regina ex rel. Harding v. Bennett* is distinguishable in its circumstances. Any ratepayer may bring such an action: Biggar's Municipal Manual, ed. of 1900, pp. 46, 47. A municipal council can be compelled by mandamus: Short & Mellor's Crown Practice, 2nd ed., p. 198.

McPherson, in reply.

Robertson, in reply. This validating Act is not affected by any other legislation: *Way v. City of St. Thomas* (1906), 12 O.L.R. 240.

December 31. OSLER, J.A.:—Appeal by the defendants (in the first action) from the judgment of MacMahon, J., at the trial, ordering the defendants the Corporation of the City of Stratford to assess and levy from the other defendants, the George McLagan Furniture Co., proper school rates for the present and succeeding years, notwithstanding a by-law of the city defendants exempting

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their co-defendants from taxation for a term of twenty years yet unexpired.

It appeared that on the 10th April, 1900, a by-law, No. 852, was submitted to the vote of the electors to enable the city to guarantee the payment of a loan of \$30,000 to be obtained by the defendant company in connection with an agreement to be entered into between the company and the city for the erection by the former of a furniture manufactory. The by-law recited that it was "the intention," in the event of its being adopted by a majority of two-thirds of the ratepayers of the city entitled to vote upon a money by-law, to apply to the Legislature for an Act confirming the same and authorising the guarantee and agreement, and it provided that, in the event of an agreement satisfactory to the council being entered into, the land whereon the factory should be erected should be exempt from taxation for the period of twenty years next succeeding the giving of the guarantee, or, if the guarantee were given in the last half of the year, then from the 1st day of January next succeeding the giving thereof.

The by-law was carried by more than the requisite majority, and by an Act of the Legislature passed in the same year, assented to on the 30th April, 1900, it was enacted that the city should have power to pass the by-law which had been so assented to, and, subject to the passing thereof, the by-law was confirmed and declared to be legal and binding upon the city. It was further enacted that upon the passing of the by-law it should be lawful for the city to enter into an agreement with McLagan or such corporate company as might be promoted by him, in the terms set forth in schedule B of the Act, and that such agreement, upon the execution thereof, should be valid and binding upon the parties thereto. Section 3 provided that it should be lawful for the city, upon the execution of the agreement, to guarantee the payment of the \$30,000 to be borrowed by McLagan or his company, and to take security from him or them in the manner set forth in the agreement; and sec. 4 authorised the city and McLagan or his company to modify the proposed agreement by any provision which would lessen or reduce the concessions to be made by, but not the security offered to, the city.

The council passed the by-law on the 7th May, and thereafter, as late, it seems, as November, 1900, entered into an agreement

in expressed pursuance of the Act, by clause 5 of which it is agreed that the company "are to be given exemption from taxation for the lands and premises described, and the buildings, plant, and machinery thereon, for the term of twenty years from the first of January next ensuing the date hereof. Provided always such exemption from taxation shall not be deemed to authorise exemption from taxation for school purposes from and after the amendment of said by-law 852, upon request of the company, which is to be given if satisfied this by-law so amended and all therein and hereunder desired may or can be accomplished legally."

This proviso is not in the form of agreement set forth in the schedule to the Act. No amendment of the by-law seems to have been required, but from the execution of the agreement to the present time, under the assumed authority of the by-law and agreement, school taxes have not been imposed or levied upon the defendant company.

The plaintiff, contending that the general law was not affected by the special Act, by-law, and agreement, brought this action to compel the city to assess, levy, and collect school rates upon the property of the company, as well for the past as for the future years of the period of twenty years mentioned in the by-law, and for a declaration that the city are in future bound to collect them. MacMahon, J., made a mandatory order in respect of the latter, but refused relief as to past years; and both parties appeal.

The statute law in force as to the power of municipal corporations to exempt manufacturing establishments from taxation, at the time of the submission of the by-law in question to the vote of the electors and of the application for the Act, was sec. 411 of the Municipal Act, R.S.O. 1897, ch. 223, as substituted for the original section, by the Municipal Amendment Act of 1899, 62 Vict. (2) ch. 26, sec. 25, clause (a) of which provided that "every municipal council may by by-law exempt any manufacturing establishment . . . in whole or in part from taxation *except as to school taxes* for any period not longer than ten years and to renew (*sic*) this exemption for a further period not exceeding ten years." A similar exception was contained in the original sec. 411, and also in the Act from which that section was taken, and in which it first appears, viz., 55 Vict. ch. 42, sec. 366, assented to 14th April, 1892. And sec. 73 of the Public Schools Act,

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R.S.O. 1897, ch. 292, which is a re-enactment of 59 Vict. ch. 70, sec. 73, and 55 Vict. ch. 50, sec. 4 (the latter assented to 14th April, 1892), also provided that "no by-law passed by any municipality after the 14th day of April, 1892, for exempting any portion of the ratable property of a municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind whatsoever." See also 1 Edw. VII. ch. 39, sec. 77; 9 Edw. VII. ch. 89, sec. 39.

The by-law in question was *ultra vires* the council: (1) in guaranteeing a loan to a manufacturing establishment, which, at this time, and until the amendment (by 63 Vict. ch. 33, sec. 9) of sec. 591 of the Municipal Act, was unauthorised; and (2) in granting exemption from taxation for twenty years, the limit of such a concession being ten years, with a power to renew for a further like period. In these two respects, at all events, it was necessary, and was the understood and expressed intention of the parties, who knew the existing state of the law as to exemption from taxes, to apply to the Legislature for a confirmatory Act, and there is absolutely nothing to shew that when such application was made anything else was contemplated as regards the granting exemption from taxation than to validate an immediate grant of twenty years' exemption instead of ten—in other words, to authorise the present extension of the period of exemption. The expressions "exempt from taxation," "exemption from taxation," though general and on their face comprehensive of taxation for every purpose, would, if used in reference to a ten-year period, have been subject to the constant exception of the general law; and, in the absence of anything to shew that in the special Act they were intended to have a larger meaning and to exclude the exception, it ought to be held, in accordance with the settled principle of construction, that the Legislature did not intend to do more than to alter the general law in so far as it was necessary to permit a longer period of exemption than by that law the council could grant, or to abandon what seems to have been the settled policy of the Legislature in respect of school rates since the year 1892, a policy affirmed by sec. 25 of the Municipal Amendment Act, passed at the same session as the Act by which the by-law was confirmed.

See also the Consolidated Municipal Act, 1903, sec. 402 (1):

“ . . . No . . . council shall assess and levy in any one year more than an aggregate rate of two cents in the dollar on the actual value, exclusive of school rates,” etc.; 29 & 30 Vict. ch. 51, sec. 225.

I refer to Maxwell on Statutes, 4th ed., p. 122; Craies on Statute Law, 4th ed. (Hardcastle), pp. 173-4; and to *Minet v. Leman* (1855), 20 Beav. 269, 278, where it is said: “The general words of the Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched. . . . This principle of construction, as a general proposition, cannot be disputed.” Exemption from taxation may, therefore, well be construed as exemption of such a character as was already permitted, though continued for a longer term than, without special legislation, was capable of being granted by the council in the first instance.

The case of *Canadian Pacific R.W. Co. v. City of Winnipeg* (1900), 30 S.C.R. 558, not, I think, cited on the argument, turned upon the effect of legislation and on the language of a by-law so different from that with which we are concerned that it has no application to the present case, as is shewn in the judgment of my brother Garrow. I refer also to *Regina ex rel. Harding v. Bennett*, 27 O.R. 314, merely to shew that it has not been overlooked. It deals with a different subject, and the judgment of Street, J., explains why, in his view at all events, the words “exempt from taxation,” as used in the proviso added by 56 Vict. ch. 35, sec. 4, to sec. 77 of the Municipal Act, necessarily meant “exempt from all taxation,” which, he thought, might very well be, in the case of exemption by-laws passed before 1892.

For these reasons, I agree with my learned brother MacMahon’s judgment as regards the construction of the by-law.

It was strongly contended by the defendants that an action was not maintainable, because the plaintiff might and should have raised the question by an appeal in the ordinary way to the Court of Revision, and, in any event, that the relief sought and granted was inappropriate.

Having regard to secs. 57, 62, and 65 of the Assessment Act, relating to the constitution of the Court of Revision and its duties, and the right of a municipal elector to complain of the wrongful

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omission of any person from the assessment roll, and the procedure provided for the trial of complaints, I think that, if I had been trying this case alone, I should have held that the plaintiff was bound to resort to the summary method of procedure provided for by the Act: *Barraclough v. Brown*, [1897] A.C. 615; *Attorney-General v. Cameron* (1899), 26 A.R. 103; *Canadian Land and Emigration Co. v. Municipality of Dysart* (1885), 12 A.R. 80, 83; *Grand Junction Waterworks Co. v. Hampton Urban District Council*, [1898] 2 Ch. 331; *Offin v. Rochford Rural District Council*, [1906] 1 Ch. 342; and similar cases. Clearly, in an action constituted as the present, the utmost relief the plaintiff could have would be a declaration of the true construction of the Act and by-law, as the council does not directly assess and levy the rate. My learned brothers, or a majority of them, are of the opinion that, having regard to the discretionary power reposed in the Court as to making declaratory orders, the present is a proper case in which to make one: *Elsdon v. Hampstead Corporation*, [1905] 2 Ch. 633, 642; *West Ham Corporation v. Sharp*, [1907] 1 K.B. 445. On the whole, though my doubts are not entirely laid, I will not dissent from that result, as, on the score of convenience at all events, it is persuasive, and the plaintiff as a municipal elector is interested, and the term of exemption will not expire for several years. It will be necessary for him to amend his statement of claim so as to claim the relief which the Court think him entitled to.

There is a cross-appeal in respect of the rates for past years. This, I think, must be dismissed, as the Assessment Act limits the relief in that respect, and shews how it is to be obtained, and there is, moreover, no evidence before the Court, even if there were jurisdiction to do so, to make any order on the council as to this.

The plaintiff should have his costs of the action, but, success being divided, there should be no costs of the appeal or cross-appeal.

The questions in the second action are similar to those raised in the first, and the appeal and the costs of the action and appeal will be disposed of in accordance with our judgment in that case.

GARROW, J.A.:—These two actions, the one against the Corporation of the City of Stratford and the George McLagan Furni-

ture Company Limited, the other against the city corporation and the Whyte Packing Company Limited, were tried together before MacMahon, J., without a jury, who found for the plaintiff in both cases. The plaintiff, a ratepayer who sued on behalf of himself and all other the ratepayers of the city, claimed a mandamus compelling the city to assess, levy, and collect from the defendants certain arrears of school taxes, and a declaration that the city corporation are in the future bound to collect from the other defendants such school taxes.

The facts in both cases are essentially identical. It is not disputed that for several years the defendants the McLagan company and the Whyte company have not been assessed for and have not paid school taxes, from the payment of which they claim to have been legally exempted under certain by-laws and agreements validated by statutes: see 63 Vict. ch. 98 (1900) and 62 Vict. ch. 82 (1899), in which statutes are set forth the by-laws and agreements relied on.

The matter, in my opinion, is purely one of construction. And the words to be construed in both cases are "the said company are to be given exemption from taxation." And the question is, do these words include exemption from school taxes, as well as from the ordinary municipal taxation, about which there is no dispute.

A somewhat similar question was much discussed in *City of Winnipeg v. Canadian Pacific R.W. Co.* (1899), 12 Man. L.R. 581, and *S. C., sub nom. Canadian Pacific R.W. Co. v. City of Winnipeg*, 30 S.C.R. 558. There a by-law was passed by the city council, and validated by the Legislature of the Province, which by its terms exempted forever the defendants' property from "all municipal taxes, rates, levies and assessments of every nature and kind." After the by-law had been validated, the property of the defendants was, by direction of the city council, assessed for school taxes, and an action was brought to recover them, the council contending that school taxes were not included in the words "municipal taxes, rates, levies and assessments," a contention which succeeded in the Provincial Courts but failed in the Supreme Court, but expressly upon the ground that a school tax is a municipal tax, and was therefore within the exemption which had been sanctioned by the Legislature. A careful examination of

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the circumstances, however, prevents that case, in my opinion, from being an authority for the position taken here by the defendants. The course of legislation there and here must, of course, be looked at, and it will be found that, while there are certain points of resemblance, there are also other points of a very decisive difference. In Manitoba the statutory power of municipal councils to exempt the property of a railway company extends to "all taxes, assessments and municipal imposts whatsoever for a period of not exceeding twenty years," and there is apparently no express exception there, as there is in this Province, of school taxes. And what the validating statute did, and was intended to do, was simply to permit the period of twenty years to be made perpetual, for it added nothing to the language itself under which the exemption was claimed. The effect, or at least one effect, of the decision, therefore, is, that, without a validating statute at all, the city council might have lawfully exempted for a period not exceeding twenty years, and that such exemption would, by reason of the extensive language of the statute, have included school taxes. There are no similar words in our statutes.

From the beginning, the words have been in effect to "exempt from taxation," simply: see 31 Vict. ch. 30, sec. 44, the first of the numerous statutes on the subject. At that time (1868), and for several years later, municipal councils had no power or control over school taxes, which were assessed, levied, collected, and expended by a wholly independent corporation, the board of school trustees. If that had continued to be the law, no one would surely contend that the language of that statute was intended, under the circumstances, to include school taxes. And, after a careful examination of the several succeeding statutes on the subject, I have failed to find any indication of an intention on the part of the Legislature to extend the powers in this respect of municipal councils, unless it be the indirect circumstance that since 1892 (55 Vict. ch. 42, sec. 366) such councils have been expressly prohibited from exempting from school taxes. This circumstance, however, in the light of the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, sub-secs. 51, 52, is, in my opinion, and notwithstanding what was said by Street, J., in *Regina ex rel. Harding v. Bennett*, 27 O.R. 314, at p. 318, quite insufficient to establish that the law was otherwise before that amendment.

Municipal councils had in the meantime been given no increased power or control over school taxes. True, from the year 1874 (see 37 Vict. ch. 28) the municipal officers and municipal machinery had been increasingly used in the assessing for and collecting of school taxes. But it is abundantly clear that in such matters the municipal officials acted, as they still act, merely as the agents of the quite independent school boards, who demand from the council such sums as their necessities require, which, when received, they expend as they please without any kind of supervision or control on the part of the council. Of course, in view of the express prohibition against the exemption from school taxes contained in 55 Vict. ch. 42, sec. 366—a prohibition contained in all subsequent statutes—it is of minor importance to come to a definite conclusion as to what the law was prior to the date of that enactment. And indeed its only importance is to assist, if it will, however slightly, to a proper understanding of what it was the Legislature probably intended to sanction when it validated the agreements, etc., in question. The longest term for which exemption could have been granted was, under our statutes, ten years. The consent of the Legislature was, therefore, necessary to extend this term to the twenty years agreed upon between the parties. If the same language had been used in a by-law within the competence of the council, *i.e.*, for a term of ten years, it must have meant “exclusive of school taxes.” And in a by-law for a term of twenty years which the statute has validated, it must, in my opinion, receive the same construction, unless we can clearly gather an intention on the part of the Legislature not merely to allow the extended term, but also a withdrawal of the express statutory prohibition against exempting from school taxes, which, if not always the law, as, in my opinion, it was, has been at least the declared legislative policy ever since the year 1892. And of any such intention I am unable to see a particle of evidence.

Upon whom, it may, as a further test of the legislative intent, be asked, is the burden to fall? Can it reasonably be supposed that it was intended that the school board should bear it, while having had no voice in its creation? That is too unreasonable a supposition to ascribe to the Legislature. And, if not the school board, then the burden could only fall upon the ordinary rate-

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payer, who must pay so much more to make up the school tax so lost by the exemption. This, too, would be manifestly unfair, and very probably illegal, because to the general fund created by municipal taxation the separate school supporters who are also ratepayers, contribute; and a part of their taxes would thus be necessarily diverted to make good the deficiency.

But, while thus agreeing with MacMahon, J., upon the main contention, I incline to think that the proper measure of relief is, under all the circumstances, a declaration applicable to the future only. So far as the past is concerned, there would be obvious difficulties in the way, owing to the fact that no yearly assessments were made for the taxes in question. Assessment is based upon values; and values as well as rates change, or may change from year to year.

And, again, recoupment by means of an assessment now for the arrears would not enure to the benefit of the same body of ratepayers, which also constantly changes, as if such taxes had been assessed for and collected year by year. So that perfect justice as to the past does not seem reasonably possible of attainment, and the parties, who no doubt acted in good faith, although mistakenly, may very well be left as to it where they are.

It was contended before us that the plaintiff's proper remedy was by an appeal to the Court of Revision. Such an appeal might, no doubt, have been taken by him or by any other ratepayer. But that, I think, was not his only remedy. He had also, I think, a right as a ratepayer to obtain a declaration in the ordinary Courts such as he seeks in these actions of the true meaning and construction of the several documents under which the exemptions in question are claimed.

With the variations as to the mandamus which I have suggested, the appeals should otherwise, in my opinion, be dismissed.

MOSS, C.J.O., and MACLAREN, J.A., agreed with GARROW, J.A.

MEREDITH, J.A.:—That which was bargained for, by each of the companies, and intended to be given by the municipality, was exemption from all taxation, upon the land exempted, for twenty years. The subsequent conduct of all parties makes this quite plain.

The rights of the Board of Education were in no substantial

manner affected by such an agreement. The amount required, and levied, for its purposes, would not be lessened by such exemption; it would all be levied upon the unexempt property in the municipality.

Then, is there anything to prevent effect being given to that agreement in its entirety? I think not. It has been confirmed, and given legal effect, by competent legislation.

It is true that the municipality had not power, at the time, to exempt from school rates; but the Legislature, of course, had; and could confer that power upon the municipality; and it was just because of that that the confirmatory legislation was sought and obtained. The parties to the agreement wished to exceed the municipality's power in regard to the duration of the exemption, as well as in respect of school rates, and in each respect was obliged to obtain special legislation so as to make the agreement effectual.

The rule of construction upon which the judgment in appeal is based is not, in my opinion, applicable to the case. There was no general statutory prohibition against exemption from school rates; the right to exempt from such rates was merely denied the municipalities; and so it was necessary to apply to the Legislature in every case in which such exemption was desired. Why might not the Legislature very well grant an application such as this—the other ratepayers, for the valuable consideration they were, or believed they were, to receive, being willing to assume, and pay, the whole school rates, as they must?

I can perceive, therefore, no good reason for refusing to give to the words “exemption from taxation” their full meaning, and, accordingly, would allow these appeals, and dismiss the actions.

Taking this view of these cases, it becomes unnecessary to consider whether actions, such as these, lie, or, if so, the nature and extent of the relief which could be given in them: though I must say that, at present, I fail to understand what right the Courts have to overrule, or dictate to, the special tribunals created for the purpose of dealing with all matters of assessment for taxation, except upon an appeal, from such tribunals, in the manner prescribed by law: or why any of such tribunals should be bound by any “declaratory” judgment, such as this.

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Dec. 31. *Will—Construction—Trust—Investment in Land—Sale at Profit—Accretion to Capital—Tenant for Life—Remaindermen.*

The rule that profits arising from the realisation of an investment in shares or bonds or in land are accretions to the capital of the trust fund and do not belong to the tenant for life, deduced from cases decided in New York and other States, adopted.

The testator gave the principal part of his property to his son T., charged with, among other sums, \$35,000 to be paid by T. to trustees to be held by them for the purposes of the E. trust. T. was to pay this sum to the trustees by instalments, and to pay interest on the portions from time to time remaining unpaid. The trustees were to keep the \$35,000 invested, and to pay the interest received from T. and from the investments, to E. during his life, and after his decease to divide the capital amongst his children. There was a proviso that if E. should die leaving his son H. his only child surviving him, only \$15,000 of the E. trust fund should be paid to H., and the remaining \$20,000 should be applied to another trust. The trustees were authorised to invest in the purchase of real estate in Ontario yielding a rental of at least six per cent. per annum, with power from time to time to alter and vary the "securities" into others of a like nature. The trustees made a profit on the sale of land purchased by them for the E. trust:—

Held, that E. was not entitled to the profit.

MOTION by the trustees, under Con. Rule 938, for the determination of certain questions arising upon the will and codicils of the late Thomas C. Watkins. The facts are stated in the judgment.

The motion was heard by MEREDITH, C.J.C.P., in the Weekly Court, on the 6th December, 1909.

G. F. Washington, K.C., for the trustees.

G. F. Shepley, K.C., for Thomas W. Watkins.

C. J. Holman, K.C., for Edgar H. Watkins.

December 31. MEREDITH, C.J.:—The only question ripe for determination is as to the right of Edgar H. Watkins, a son of the testator, to the profit made by the trustees on the sale of land purchased by them for the Edgar H. Watkins trust, under the powers conferred on them by the will, and which realised \$6,000 more than the price at which it was purchased.

By the will the principal part of the property of the deceased was given to Thomas W. Watkins, charged with an annuity of \$2,000 per annum to the testator's wife, and with, among other sums, \$35,000 which was to be paid to the trustees and held by

them for the purposes of the Edgar H. Watkins trust; the payment was to be made in annual instalments, and Thomas W. Watkins was to pay interest at the rate of five per cent. per annum on so much of the sums charged upon the property given to him as from time to time remained unpaid.

The scheme of the will is that the bulk of the testator's property should go to his son Thomas W. Watkins, charged with the payment of the annuity to the testator's widow, and of \$150,000 to the executors by yearly instalments of \$5,000, or more if Thomas chose to pay more, and with interest at the rate of four per cent. per annum on the amount from time to time remaining unpaid, except in the case of the \$35,000 which was to go to the Edgar H. Watkins trust, and as to that sum at the rate of five per cent. per annum.

The \$150,000 was to be applied as follows: \$35,000 to make up a trust fund to be called the Edgar H. Watkins trust; \$25,000 in payment of a legacy of that amount to the testator's daughter Emily; \$25,000 to make up a trust fund to be called "the Mrs. Reasner trust;" \$25,000 to make up a trust fund to be called "the Mrs. Annis trust;" and the residue to make up a trust fund called "the Park trust," with a provision that Thomas would not be required to make any payment towards the capital of this latter trust within twenty-three years from the date of the testator's death.

The trusts of the will as to the fund called the Edgar H. Watkins trust fund are declared by paragraph 21, the material provisions of which are as follows:—

"21. I direct that the \$35,000 hereinbefore referred to as 'Edgar H. Watkins trust' shall be held by my trustees in trust to invest and keep the same invested in securities of the class hereinbefore directed, and Thomas W. Watkins . . . shall as hereinbefore directed pay interest at five per cent. per annum quarterly on the said \$35,000 from the date of my death on such portion of said \$35,000 as shall from time to time be unpaid by him, and the interest to be received by my trustees from Thomas W. Watkins and from said investments respectively from time to time as payments on account of the capital by said Thomas W. Watkins shall be paid in quarterly payments reckoning from the day of my death to my son Edgar H. Watkins during his life

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and from and after his decease in trust to divide and pay over the capital amongst all his children alive at the time of his decease equally or if any of them be dead. . . . Provided always that should my son Edgar H. Watkins die leaving his son Harry his only child surviving him, only \$15,000 of the Edgar H. Watkins trust shall be paid to the said Harry Watkins and the remaining \$20,000 shall be applied and paid over to the Park trust to be used for the purpose of such trust as set forth in this will."

Provisions are also made as to the legacy to the testator's daughter Emily, and as to the other trust funds, to which it is unnecessary to refer.

The directions of the testator as to investments referred to in paragraph 21 are found in paragraph 20, and are that the trustees should invest all moneys which under the terms of the will they are required to invest, in, among other things, the purchase of real estate in Ontario yielding a rental of at least six per cent. per annum, with power from time to time to alter and vary the "securities" into others of a like nature, as the trustees might deem prudent.

By a codicil of the 8th May, 1890, \$5,000 which is directed to be provided by Thomas W. Watkins was added to the Edgar H. Watkins trust fund.

It is upon these provisions that the question of the right of Edgar H. Watkins to the profit made on the sale of the land is to be determined.

I was not referred to any case in an English or Canadian Court in which the question of the destination of such a profit has been determined, nor has my own search for authority from those sources been successful.

The only case which I have found which touches even the fringe of the question is *Scholefield v. Redfern* (1863), 32 L.J. Ch. 627, in which it was decided by Vice-Chancellor Kindersley that where stocks are sold between dividend days the Court will not apportion the proceeds of the sale so as to give the tenant for life the value of the current dividend involved in the sale moneys, even where the subject matter sold may consist of debentures or securities carrying interest *de die in diem*.

A different view to that of the Vice-Chancellor was taken by the Supreme Judicial Court of Massachusetts in *Hemenway v.*

Hemenway (1883), 134 Mass. 446, 453, but upon the ground that the difficulties pointed out by the Vice-Chancellor of ascertaining how much of the fund was applicable to income did not exist in the case of the securities in question, because "by the Boston usage, the sum paid for accrued interest is always expressly stated."

The dearth of English authority is probably to be explained for the reason given by Devens, J., in *New England Trust Co. v. Eaton* (1886), 140 Mass. 532, at p. 539, that until 22 & 23 Vict. ch. 35, sec. 32, "only one security—the three per cent. consols—was there recognised as proper for trust estates," and such investments were permanent in their character.

In many of the Courts in the neighbouring Republic the question has been considered and decided, and the rule generally adopted is that profits arising from the realisation of an investment in shares or bonds or in land are accretions to the capital of the trust fund and do not belong to the tenant for life.

This was decided by the Court of Appeals in *In re Gerry* (1886), 103 N.Y. (58 Sickels) 445, reported also in 18 Abbott N.C. 178, to which there is added a note of the decisions "on premium and depreciation in securities held in trust," and in the same State, in *Stewart v. Phelps* (1902), 71 App. Div. 91, affirmed by the Court of Appeals (1903), 173 N.Y. 621. See also *Re Pollock* (1877), 3 Redfield 100; *Townsend v. United States Trust Co.* (1877), *ib.* 220; *Whitney v. Phoenix* (1880), 4 Redfield 180; and *Scovel v. Roosevelt* (1881), 5 Redfield 121.

The same view was enunciated by the Supreme Court of Errors of Connecticut, in *Boardman v. Mansfield* (1907), 66 Atl. Repr. 169, and by the Supreme Judicial Court of Massachusetts in *New England Trust Co. v. Eaton*, *supra*.

In Pennsylvania, where the decisions are more favourable to the tenant for life in the case of trust moneys invested in shares of a company than are the English decisions, the ruling in *In re Gerry*, *supra*, is nevertheless recognised as good law, and it is said by the Chief Judge, whose dissenting opinion was adopted by the appellate Court: "If the testator had manifested an intent that the fund should be invested in the purchase of lands and thereby work a conversion, any increase in the value of the lands must, it is conceded, have enured to the benefit of the remainder:" *Park's Estate* (1896), 173 Pa. St. 190, 193-4.

These cases seem to me to have been rightly decided, and to

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have enunciated a general rule for determining as to the destination, as between the tenant for life and the remainderman, of the profit realised from an investment in land or from the sale of securities which are sold at a price in excess of that for which they were purchased, which is not only just as between the tenant for life and the remainderman, but also consonant with reason, and I adopt as my own the reasoning upon which the rule is based.

This general rule cannot, of course, prevail where the language of the instrument by which the trust is created indicates that it was intended that greater rights should be conferred on the tenant for life.

I am unable, however, to find in the will and codicils the provisions of which I have to consider any indication of such an intention on the part of the testator.

It is true that when he is dealing with the destination of the fund of \$35,000 in the event of Edgar H. Watkins leaving only his son Harry surviving him, he speaks of what in that event is to go to the Park fund after paying to Harry \$15,000 as "the remaining \$20,000."

The use of such language has been held not to prevent the application of the rule that the remainderman is entitled to the benefit of an accretion to the capital of the trust fund: *Paris v. Paris* (1804), 10 Ves. 185; *Hooper v. Rossiter* (1824), McCl. 527; *Clafin v. Dewey* (1900), 177 Mass. 166, the latter of which is erroneously stated in Cook on Corporations, 6th ed., p. 1526, note 4, to be a decision to the contrary.

The direction of the testator as to investments in the purchase of land, that only real estate in Ontario yielding a rental of at least six per cent. per annum on the capital invested was to be purchased, indicates, I think, that he had in contemplation that the only benefit the life tenant was to be entitled to was the income of the invested funds.

Upon the whole, I am of opinion that Edgar H. Watkins is not entitled, under the direction in paragraph 21 of the will, to be paid, as part of the "interest" which the trustees are directed to pay to him, the profit realised from the money invested by the trustees in the purchase of land, and there will be a declaration accordingly.

It is not, I think, unreasonable that the costs should be paid out of the corpus of the "Edgar H. Watkins trust," and I so direct.

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Mechanics' Liens—Building Contract—Progress Estimates—Architect's Certificate—Condition Precedent—Certificate Given after Action Begun—Default in Guaranteeing Performance of Contract—Refusal to Make Payments—Discontinuance of Work on Building—Insurance Premiums—Payment by Contractor—Delay in Completing Work—Extent of Lien—Amount Due under Contract—Mechanics' and Wage Earners' Lien Act, secs. 4, 9—Percentage Retained—Lien not Presently Enforceable—Right to Apply—Surplus Proceeds of Sale.

Work was done and materials supplied by the plaintiffs for the defendants in connection with the building of an hotel, under a written contract dated the 26th June, 1907. The plaintiffs undertook to complete the work, to the satisfaction of an architect, in accordance with specifications and drawings and with the conditions of the agreement, for \$115,000, which the defendants were to pay as the work progressed in monthly payments representing 85 per cent. of the amount of the work done and materials supplied, and for this percentage the architect was to issue progress estimates each month, on which payments were to be made, and the final payment was to be made on the expiration of thirty-one days after the plaintiffs had fulfilled the agreement. Payments were to be made only upon the written certificates of the architect that they were due. The plaintiffs were to complete and have ready for occupation by the 1st January, 1908, the first and second flats and part of the basement; to complete the remainder, except the outside finishing, by the 1st April, 1908; and to complete the whole by the 15th May, 1908. A large amount of the work was done, and nine progress estimates, the last dated the 1st June, 1908, were given by C., acting for the architect, amounting to \$57,533.36. The amounts mentioned in five of these certificates were paid by the defendants, and a portion of the sixth; the defendants refused to make any further payments, on the ground that the plaintiffs were in default in not procuring and delivering to the defendants a bond guaranteeing the performance of the contract, which, by the contract, the plaintiffs undertook to do within fifteen days from the date of the contract. The plaintiffs thereupon stopped work on the building, and on the 14th July, 1908, brought this action to recover the amount alleged to be due to them for all work done and materials supplied by them, and to enforce their lien therefor under the Mechanics' and Wage Earners' Lien Act. Pending the action and on the 19th July, 1909, ten days before the trial, the architect gave the plaintiffs another progress estimate in which he estimated the cost of the work to the date of the estimate at \$64,263.49:—

Held, that the defendants' refusal to make further payments was not justifiable, nor were the plaintiffs justified in discontinuing work. The plaintiffs were not entitled to be paid anything but the sums for which the architect had given them progress estimates; and were not entitled, in this action, to recover for the amount of the estimate of the 19th July, 1909.

By clause 13 of the contract provision was made for the payment of insurance premiums by the defendants during the progress of the work, but at the cost and expense of the plaintiffs, until the completion of the basement and the first and second flats, which were to have been, but were not, completed by the 1st January, 1908, but the defendants were to pay the cost and expense of the insurance from and after the 1st January, 1908:—

Held, that the plaintiffs were not chargeable with the amount paid by the

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defendants for fire insurance on the building subsequent to the 1st January, 1908.

It was contended that under sec. 4 of the Mechanics' and Wage Earners' Lien Act the lien was given in respect of the work or service performed and the materials furnished, and that for the value of these, after deducting the payments made, the plaintiffs were entitled to a lien, irrespective of the terms of the contract and the conditions as to payment:—

Held, having regard to the provisions of secs. 4 and 9, that the terms of the contract could not be disregarded; and the plaintiffs were not entitled to payment on a *quantum meruit*.

Nor did the mere failure of the defendants to pay the amount which the plaintiffs were entitled to present payment of in respect of the progress estimates, entitle the plaintiffs to claim present payment of the percentage to be retained until the final completion and to enforce their lien for that percentage.

The judgment should provide that any surplus realised by sale after payment of the sums directed to be paid out of the proceeds of the sale, should remain in Court subject to further order; and should reserve leave to the plaintiffs to apply in respect of their lien, if any, for work done or materials furnished for which payment was not provided for by the judgment.

Judgment of the local Master at Kenora varied.

ACTION under the Mechanics' and Wage-Earners' Lien Act to recover \$25,827.03 and interest for work done and materials supplied in the erection of a building proposed to be called "The Tourist Hotel" on lots 8 and 9 in block 2 in the town of Kenora.

The action was tried before the local Master at Kenora, who on the 3rd August, 1909, gave judgment as follows:—

The plaintiffs, who are contractors, entered into a written contract with the defendants, bearing date the 26th day of June, 1907, and executed by each of the parties under seal, whereby the plaintiffs contracted and agreed with the defendants to do the work and furnish the materials as therein set out. The work was to be done in accordance with certain plans and specifications under the direction and to the satisfaction of F. V. Newell, an architect of the city of Chicago, acting as agent for the defendant company. The plaintiffs were to be paid for the whole of the said work the sum of \$115,000, which sum was to be paid in instalments as the work progressed, such instalments to represent 85 per cent. of the amount for work done and materials supplied on the ground. All payments were to be made only upon the written certificates of the architect to the effect that such payments were due, such certificates to be as accurate as possible and issued on the first day of each month, and the payments to become due on the second day of the same month—the final payment to be made on the expiration of thirty-one days after the contractors have fully

carried out and fulfilled the contract and fully completed said works. Provision was also made in the said contract that, within fifteen days after its date, the plaintiffs should deliver to the defendants a good and sufficient bond of a guarantee company, satisfactory to the defendants, in the sum of \$10,000, for and conditional upon the faithful and full performance of the provisions, stipulations, and covenants on the part of the said contractors therein contained.

The plaintiffs commenced work in July, 1907, and nine progress certificates were issued by the architect, through his representative, John C. Caldwell, in accordance with the terms of the said agreement. Five of these certificates were paid by the defendants, and a portion of the sixth; but, the plaintiffs having failed to deliver the bond in accordance with the agreement, the defendants refused to make any further payments on account of the said progress certificates until the delivery of the bond. The plaintiffs thereupon stopped work on the building, and brought this action to recover the amount of the balance they claimed for all work done and materials supplied by them, on a *quantum meruit*. It is admitted that the building has not been completed by the plaintiffs in accordance with the terms and conditions of the agreement, nor has it been in any way accepted by the defendants. The question, therefore, is, whether the plaintiffs are entitled, in the circumstances, to recover the amount claimed by them or any portion of it.

It is, I think, perfectly clear that the contract is an entire and not a divisible contract, as contended for on the part of the plaintiffs. It is a contract to do the whole work stipulated for, in consideration of a fixed sum, a portion of which, under its terms, was not to be paid until a period subsequent to, not only the performance, but the acceptance, of the work to be done under it. Manifestly, performance is a condition precedent to the right of the plaintiffs to enforce payment of the balance of the work done and the materials provided exceeding what was allowed in the progress certificates.

I find that there has not been any waiver or rescission of the contract, nor any discharge or exoneration of the parties, or either of them, mutual or otherwise. The contract, being under seal, can only be discharged by the parties by an agreement expressed

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under seal, and is still subsisting between them. When default is made in the performance of a contract by one of the parties, it is for the Court to determine whether or not the default amounts to a renunciation by the party making it.

It was clearly held in *Mersey Steel and Iron Co. v. Naylor* (1884), 9 App. Cas. 434, and in *Freeth v. Burr* (1874), L.R. 9 C.P. 208, that, where payments are made by instalments, the default in payment of any instalment will not discharge the contract, though it may give the right of action.

The general rule is, that an agreement ought to receive that construction which will best effectuate the intention of the parties, to be collected from the whole agreement, words being understood in their plain and literal meaning.

There is no question but that the plaintiffs were bound by the 17th clause of the contract to deliver a bond as therein set out, but their failing to do so did not justify the defendants in refusing payment of their progress estimates issued from month to month, notwithstanding such default; such an agreement being, I consider, a warranty and not a condition, for which the defendants had their remedy.

The decision in *Behn v. Burness* (1863), 3 B. & S. 751, 756, was, that if, after breach, the promisee continues to accept performance, the condition loses its effect as such, and becomes a warranty, in the sense that it gives a right of action.

And, on the other hand, even if the defendants did refuse to pay any more of the progress certificates until the bond was delivered, the plaintiffs were not justified in abandoning the works on that account, as it only gave them a right to bring an action to recover the amount due to them under the said certificates. And I am of the opinion that that is all they are entitled to recover in this action.

There are many decisions enunciating the rule that the plaintiffs, under the circumstances as they appeared at the trial of this action, cannot recover for the price of the work done and the materials actually used as on a *quantum meruit*. The leading authority in our own Courts is *Sherlock v. Powell* (1899), 26 A.R. 407, where it was held: "Where there is a contract to do specified work for a fixed sum, with a proviso for payment of proportionate amounts, equal to eighty per cent. of this fixed sum, as the work

is done, and the balance of twenty per cent. in thirty days after completion and acceptance, completion is a condition precedent to the right to payment, and where the work is not completed there is no right to recover for the portion done as upon a *quantum meruit*." The facts in that case were very similar to those in this action, and the Court of Appeal were unanimous in upholding the judgment of the Divisional Court in dismissing the plaintiffs' action. There he had been paid the amount of the progress certificates, and brought action for the balance before completion and acceptance.

See also *Ellis v. Hamlen* (1810), 3 Taunt. 52, where, the plaintiff not having completed the building, it was held that he could not recover on a *quantum meruit*, for the work, labour, and materials; also *Munro v. Butt* (1858), 8 E. & B. 738; *Sumpter v. Hedges*, [1898] 1 Q.B. 673; *Appleby v. Myers* (1867), L.R. 2 C.P. 651; *King v. Low* (1901), 3 O.L.R. 234; and many other cases therein cited, in which the same rule is followed.

Mr. Hudson, in the second edition of his work on Building Contracts, vol. 1, p. 201, refers to this doctrine thus: "Where the contract is entire, and completion is a condition precedent to payment, no English case has yet decided that any allegation of 'substantial performance' will enable the builder to recover; unless there is some act of the employers, such as acceptance, waiver, or prevention, or evidence from which a new contract can be implied to pay for the work as performed and according to value, although it is not entirely completed."

The plaintiffs having failed to establish that they have fully carried out and fulfilled their contract and fully completed said building, or that its non-performance was owing to the fault or concurrence of the defendants, they cannot, it seems to me, under the terms of their contract, on the authorities referred to, recover in this action more than the balance owing to them on the 2nd day of June, 1908, according to the progress certificates issued to them by J. C. Caldwell, the superintendent.

By clause 13 of the contract provision is made for the payment of insurance premiums by the company during the progress of the works, but at the cost and expense of the contractors, until the completion of the basement and the first and second flats of the said building, which they agreed to have completed on the

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1st January, 1908, but did not, and they are still uncompleted. I find that the company have paid out \$991 on account of said insurance, which they are entitled to deduct from the amount owing to the plaintiffs, as aforesaid.

The defendants claimed to be entitled to recover liquidated damages as set out in clause 7 of the said agreement, but it appears to me that the parties intended that said damages should not be recoverable until after the completion of the building. I consider, therefore, that their counterclaim is premature, and do not allow the same, but without prejudice to their subsequently making such claim if they be so advised.

Clause 9 of the said agreement provides: "If at any time there shall be evidence of any lien or claim in respect to the works, for which, if established, the owner of the premises may become liable, and which is chargeable to the contractors, the company shall have the right to retain out of any payment then due or thereafter to become due an amount reasonably sufficient to indemnify it against said lien or claim."

Two liens were registered by sub-contractors against said building, and the lien-holders were served with notice of trial, in accordance with the Act, but one of them, W. H. Fraser, who claimed in his lien to recover \$14,238.07, did not prove his claim, and his lien is therefore discharged. The other was registered by Dingle Bros., of Winnipeg, claiming \$1,350. They appeared at the trial and proved their claim for \$888.90 and interest since the 29th July, 1908, for which sum I find they are entitled to judgment, together with witness fees, which I fix at \$9.35, but no other costs, as their claim is included in the claim of the plaintiffs, the amount of the same to be deducted from the amount owing to the plaintiffs as aforesaid.

There also appeared in the certificate of the title of said land a mortgage from the defendants to the Imperial Bank of Canada, which was registered prior to the registration of the plaintiffs' lien. The said mortgagees were not made original parties to this action, nor did the plaintiffs' statement of claim make any reference to or allegation as to the said mortgage. I therefore find, under the following authorities, that the said mortgage is a prior claim upon the said property to the plaintiffs' lien: *Bank of Montreal v. Haffner* (1884), 10 A.R. 592; *McVean v. Tiffin* (1885), 13 A.R. 1;

Hynes v. Smith (1879), 27 Gr. 150; *Reinhart v. Shutt* (1888), 15 O.R. 325; *Shaw v. Cunningham* (1865), 12 Gr. 101; *Douglas v. Chamberlain* (1877), 25 Gr. 288.

I find that the full amount payable to the plaintiffs under the said nine progress certificates was \$48,903.36, of which sum they have been paid, according to the books of the defendants, the sum of \$45,407.53 (which, if incorrect, may be adjusted at the completion of the contract), leaving a balance of \$3,495.83 owing to the plaintiffs on the 2nd June, 1908. From this amount must be deducted the sum of \$991 paid by the defendants for premiums of insurance and the sum of \$942.70, the amount of the claim of Dingle Bros.

And I find the plaintiffs entitled to judgment for the sum of \$1,562.13, with interest thereon since the commencement of this action, being the 14th July, 1908, with costs, and a lien on the said property for the said amount, subject, however, to the claim of the Imperial Bank of Canada on their prior mortgage for \$16,213.30.

The plaintiffs appealed from the judgment of the Master, and the appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ., on the 27th October, 1909.

E. D. Armour, K.C., and *G. R. Geary*, K.C., for the plaintiffs. The local Master has given judgment for the plaintiffs for a certain amount, which they contend should be increased. The defendants have unjustifiably refused to make any further payments, on the ground that the plaintiffs have not furnished a bond for \$10,000 stipulated for in the agreement between the parties, but their right to demand the bond has been waived, and the rights of the parties are no longer governed by the contract, as work under it has been stopped on account of the unjustifiable conduct of the defendants. In these circumstances, the plaintiffs' right to recover is not limited to the amount of the progress estimates, and they are entitled to recover the amount claimed by them by virtue of their lien under sec. 4 of the Mechanics' and Wage Earners' Lien Act. The Master has deducted a sum of \$991 for insurance premiums, with which he charges the plaintiffs, on the ground that they had not finished the first and second floors of the building on the date provided for in the agreement, but it was provided by

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one of its clauses that the defendants should pay all insurance after the 1st January, 1908, and this was an absolute contract, and not subject to variation on the ground contended for by the defendants.

Casey Wood, for the defendants. The extreme limit of the plaintiffs' rights was that the case should be referred to the Master, in order to give the defendants an opportunity for attacking the architect's certificate, which was given after the action had begun, and a short time before the trial. As to the deduction of the insurance premiums, the agreement provided that certain parts of the building were to be completed at certain times, and the whole contract was drawn with reference to these provisions, so that the Master was justified in charging the plaintiffs with the premiums by reason of their default in completing the buildings within the time agreed upon. The date fixed by the agreement, after which the defendants were to be charged with the premiums, should be read with its other clauses, and the contract should be looked at as a whole: *Davis v. Hedges* (1871), L.R. 6 Q.B. 687, referred to in Hudson on Building Contracts, 3rd ed., vol. 1, p. 538.

December 31. The judgment of the Court was delivered by MEREDITH, C.J.:—This is an appeal by the plaintiffs from the judgment of the local Master at Kenora, dated the 17th September, 1909, which the appellants seek to have varied by increasing the amount for which judgment was given and their lien declared to \$10,029.76.

The action is brought under the Mechanics' and Wage Earners' Lien Act to enforce a lien claimed by the appellants for work done and materials supplied by them in connection with the building of an hotel for the respondents at Kenora.

The work was done under an agreement in writing and under seal, which bears date the 26th June, 1907.

By the terms of the agreement the appellants undertook to complete the whole of the work, under the direction and to the satisfaction of F. W. Newell, of Chicago, architect, in accordance with the specifications and drawings prepared by the architect and with the conditions of the agreement, for \$115,000, which the respondents were to pay as the work progressed in monthly payments representing 85 per cent. of the amount of the work done

and materials supplied on the ground, and for this percentage the architect was, as accurately as possible, to issue progress estimates promptly on the first day of each month, and payment was to be made on the second day of the same month, and the final payment was to be made on the expiration of thirty-one days after the appellants had fully carried out and fulfilled the agreement.

The agreement provides "that all payments shall be made only upon the written certificates of the architect to the effect that such payments are due."

The agreement also provides that the appellants are to complete and have ready for use and occupation by the 1st January, 1908, the first and second flats and the basement except the billiard room and the barber shop; to complete the remainder of the work, except the outside finishing, ready for use and occupation by the 1st April, 1908; and to complete the whole of the work ready for use and occupation by the 15th May, 1908.

A large amount of the work was done, and nine progress estimates, the last of which bears date the 1st June, 1908, were given to the contractors by John C. Caldwell, who was acting for the architect, and for the amount of these, after deducting payments made on account, judgment was given in favour of the appellants.

Pending the action and ten days before the trial, which began on the 29th July, 1909, Newell, the architect, gave to the appellants another progress estimate in which he estimated the cost of the work to the date of the estimate at \$64,263.49, from which he deducted \$57,533.36, the amount of the previous estimates, leaving a balance of \$6,730.13.

Very little work was done after the date of the last estimate given by Caldwell—according to the testimony of Kelly, one of the appellants, only to the amount of about \$200—and the balance of the \$6,730.13 was made up by increasing the estimated cost of the work which had been previously done.

Some time about February or March, 1908, the respondents refused to make further payments on the progress estimates, on the ground that the appellants were in default in not procuring and delivering to the respondents the bond of a guarantee company, satisfactory to them, in \$10,000, "for and conditional upon" the performance of the agreement by the appellants, which by the agreement the appellants undertook to do within fifteen days from the date of the agreement.

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We agree with the view of the local Master that the respondents' refusal to make further payments was not justifiable, and that the appellants were not justified in discontinuing work on the building, and we also agree with the reasons given for that conclusion.

It follows that the appellants were not entitled, at all events at the commencement of the action, to be paid anything but the sums for which the architect had given them progress estimates, in accordance with the provisions of the agreement, the written certificate of the architect to the effect that the payment is "due" being a condition precedent to the right of the appellants to payment.

The claim to recover for the amount of the estimate of the 19th July, 1909, must therefore be disallowed.

The learned Master charged the appellants with \$991 paid by the respondents for fire insurance on the building subsequent to the 1st January, 1908, and in this we think he erred.

Paragraph 13 of the agreement provides that the respondents will pay "the cost and expense" of the insurance after the 1st January, 1908, but the appellants have been charged with the \$991 because they had not completed the first and second flats and basement (except the billiard room and barber shop) by that date, as they had agreed to do, and because of the opening words of the paragraph, which provide that the insurance shall be maintained during the progress of the works by the respondents, but at the cost and expense of the appellants.

We do not think there is anything in the paragraph which warrants cutting down the clearly expressed provision at the end of it, that "the company will pay the cost and expense of said insurance from and after the 1st January, 1908."

I have thus far dealt with the action as if it were one for the recovery of the money to which the appellants are entitled under the terms of the agreement, and irrespective of the effect of the Act as to the lien which they claim.

It was contended by counsel for the appellants that under sec. 4 of the Act the lien is given in respect of the work or service performed and the materials furnished, and for the value of these, irrespective altogether of the terms of the contract under which the work or service is performed or the materials are furnished,

and of the conditions it contains as to payment, and that the appellants are, therefore, entitled to a lien for the value of the work performed and the materials furnished by them, after deducting the payments that have been made.

It is clear, we think, that this contention is not well founded.

The lien is, by the provisions of sec. 4, "limited in amount to the sum justly due to the person entitled to the lien and to the sum justly owing (except as herein provided) by the owner."

And by sec. 9 it is provided that, "save as herein provided, the lien shall not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor."

It would be most extraordinary if it were otherwise, and that, although by the terms of this agreement the contractor was not entitled to more than a stipulated sum, or was not entitled to any payment unless he had performed some condition precedent to his right to call for payment, the terms of the contract are to be disregarded and the contractor entitled to be paid on a *quantum meruit*.

Nor, in our opinion, does the mere failure of the respondents to pay the amount which the appellants were entitled to present payment of in respect of the progress estimates, entitle the appellants to claim present payment of the percentage which was to be retained until the final completion of the agreement, and to enforce their lien for the percentage.

Unless they have, by their failure to complete the building in accordance with the terms of the agreement, lost their right to be paid the percentage, the appellants may have a lien for it, but a lien not presently enforceable.

The appellants' right to enforce their lien, in our opinion, can stand on no higher ground than does their right to sue for the amount they have earned under the agreement, and, the time for payment of the percentage withheld not having arrived, their right to obtain payment by enforcing their lien for it has also not arrived. See *Sherlock v. Powell*, 26 A.R. 407.

There, no doubt, may be difficulty in working out the provisions of the Act where the contractor is presently entitled to payment only on progress estimates, his right to payment of any percentage retained by the owner under the contract being deferred until the final completion of it, and the owner makes de-

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fault in paying the amount to which the contractor is presently entitled, and he is seeking to enforce his lien.

We are not, however, called on now to determine what rights the appellants, in the events that have happened, may ultimately have to be paid the percentages that have been retained by the respondents. All that it is necessary to decide is whether or not they are now entitled to sue for them and to enforce their lien in respect of them; and that, as I have said, in our opinion they are not.

The judgment makes no provision for the disposition of any surplus which may be realised by the sale after payment of the sums which are directed to be paid out of the proceeds of the sale, and the judgment should be varied by providing that any surplus shall remain in Court subject to further order, and by reserving leave to the appellants to apply as they may be advised in respect of the lien, if any, which they have for work done or materials furnished for which payment has not been made or provided for by the judgment.

The judgment must also be varied by increasing the amount which the appellants have recovered, and for which their lien is declared, by \$991, the amount of the insurance premiums which were charged to them as I have already mentioned.

With these variations, the judgment will be affirmed and the appeal will be dismissed without costs.

[DIVISIONAL COURT.]

BLAKEY v. SMITH.

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Jan. 4.

Assessment and Taxes—Tax Sale—Assessment Roll—Indefinite Description of Land—Joining two Lots in one Assessment—Invalidity of Sale—Assessment Act, 1904, sec. 172—Lands of Non-resident—Occupant Purchasing at Sale.

In 1906 a city corporation sold to the defendant for the taxes of 1901 and 1902 nine feet of lot 19 on the north side of Lennox street. The land advertised for sale was "part of lots 18 and 19, plan 120, 42 x 53, commencing," etc. Upon the assessment rolls for 1901 and 1902 the land was set down as a vacant lot on Bathurst street, "rear 767-9, 53 x 50," etc. Neither lot 19 nor lot 18 on the north side of Lennox street had any frontage on and neither lot touched Bathurst street:—

Held, that the sale was invalid because there was no valid assessment of the land in 1901 and 1902, and there were, therefore, no taxes legally imposed for which it could be sold for taxes for those years. If the assessment could be treated as one of lots 18 and 19 according to a registered plan, the joining of them in one assessment was improper, and the assessment was, therefore, invalid. And the defect was not cured by sec. 172 of the Assessment Act, 1904.

Christie v. Johnston (1866), 12 Gr. 534, followed.

Semble, per MEREDITH, C.J.C.P., that, as the land was occupied by the defendant when the assessment was made, and was owned by a person not resident in Ontario, who had not required her name to be entered on the assessment roll, it should have been assessed in the name of and against the defendant, and she, for the purpose of imposing and collecting taxes upon and from the land, was to be deemed the owner of it (R.S.O. 1897, ch. 224, sec. 22); and therefore she was not entitled to become the purchaser at the tax sale, and so to deprive the owner of part of her land, which was sold because the taxes which, if the assessor had done his duty, would have been payable by the defendant, had not been paid.

Judgment of RIDDELL, J., affirmed.

ACTION by the administratrix of the estate of the late Joseph Jones, who died in 1908, to recover from the defendants, who were husband and wife, possession of the south 53 feet of lots 18 and 19 on the north side of Lennox street, in the city of Toronto, according to plan 120, and for \$720 for use and occupation. The facts are stated in the judgments.

June 4, 1909. The action was tried before RIDDELL, J., without a jury, at Toronto.

J. R. Roaf, for the plaintiff.

J. H. Spence, for the defendants.

June 15. RIDDELL, J.:—The defendants at the trial confined their defence to three strips of this land, in width seven, one, and

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nine feet respectively. It was proved that they have been in occupation and use of all the land since about 1899, and they do not, upon their pleadings, admit the claim of title thereto.

I find that the plaintiff has established her claim to all but that specifically claimed by the defendants under their deeds. These deeds are from the mayor and treasurer of the city of Toronto, and are based upon tax sales, the deeds respectively being dated the 21st June, 1901 (seven feet), the 1st March, 1904 (one foot), and the 15th June, 1907 (nine feet).

As to the first two of these deeds, I think the statutes of (1906) 6 Edw. VII. ch. 99, sec. 9, and (1907) 7 Edw. VII. ch. 97, sec. 9, make the sales indefeasible—the statutes are very broad and general, and are, I think, conclusive.

Different considerations, however, apply to the last deed, that of the 15th June, 1907.

At the time of the assessment upon which is based the sale resulting in this deed, the defendants occupied this land along with land of their own immediately adjoining, and there was a stable, a not wholly unsubstantial building, upon the land to the east of this strip, by the side of a lane fence forming the eastern boundary of what seemed to be all one lot.

The proceedings taken in the way of sale were those applicable to property which was vacant and not built upon, and not to property which was in fact occupied and built upon. (I do not refer particularly to the provisions in each case—the statutes are clear.)

Following my own decision in *Radford v. Fisher* (1908), 12 O.W.R. 207, and the cases upon which it is founded, I must hold that this sale is irregular and invalid. The plaintiff must then recover all but the land, eight feet, covered by the two earlier deeds.

Then the defendants are liable to the plaintiff, not for “use and occupation,” indeed, because that arises by implication of law when the defendant holds or occupies the land by sufferance and permission of the plaintiff: see *per Parke, B.*, in *Prentice v. Elliott* (1839), 5 M. & W. 606, at p. 608, and *per Buller, J.*, in *Birch v. Wright* (1786), 1 T.R. 378, 387; but for “mesne profits,” which lies against a trespasser. The damages I fix at \$325.

I think the plaintiff is entitled to judgment for all the land but the eight feet, and \$325 damages.

The plaintiff has not wholly succeeded, but she should have three-fourths of her costs on the High Court scale.

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The defendants appealed from the judgment of RIDDELL, J.

September 24, 1909. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., MACMAHON and CLUTE, JJ.

W. C. Chisholm, K.C., and J. H. Spence, for the defendants. We are defending a title under a tax sale. The lands in question in this action were included in the list of lands for sale. Any lands certified by the clerk as occupied come back to the treasurer. Here there was no occupation. We rely on the judgment of Burton, C.J.O., in *Caston v. City of Toronto* (1899), 26 A.R. 459, 461. The cases which deal with sec. 176 of the Assessment Act, 1904, are relied on by the plaintiff; in these the existence of a non-resident roll is a factor: see *Dalziel v. Mallory* (1888), 17 O.R. 80. This cannot be considered occupied land. On the question of occupancy, see *Bank of Toronto v. Fanning* (1870), 17 Gr. 514. The trial Judge has paid no attention to the provisions of the Assessment Act of 1904, which are new law, and leave the Court unhampered by previous decisions. See sec. 172; also sec. 165, which gives a *quid pro quo* for the additional remedial effect of the new Act. Upon the evidence the mesne profits assessed by the trial Judge are too high.

J. R. Roaf, for the plaintiff. The land was occupied within the meaning of the cases. It was in occupation for nine years. Under the old Act, this tax sale would not be validated. The decisions are referred to in *Radford v. Disher*, 12 O.W.R. 207. See also *Wildman v. Tait* (1900-1), 32 O.R. 274, 2 O.L.R. 307.

Chisholm, in reply, referred to *City of Toronto v. Russell*, [1908] A.C. 493, 500; *Whelan v. Ryan* (1891), 20 S.C.R. 65; *O'Brien v. Cogswell* (1890), 17 S.C.R. 420; *McKay v. Cryslar* (1879), 3 S.C.R. 436.

January 4. The judgment of the Court was delivered by MEREDITH, C.J.:—The only questions involved in the appeal are

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as to the validity of the tax sale of nine feet of lot 19 on the north side of Lennox street in the city of Toronto, which took place on the 11th April, 1906, and in pursuance of which the nine feet were conveyed to the appellant* by deed dated the 15th June, 1907, and as to the amount allowed for mesne profits.

The warrant under the authority of which the sale took place is dated the 28th December, 1905, and the sale was for the taxes of 1901 and 1902, and the land advertised for sale was "part of lots 18 and 19, plan 120, 42 x 53, commencing at S.E. l. of lot 18, thence westerly."

Upon the assessment roll of 1901 the land is thus set down:—

"Bathurst street.

"Jones, Joseph.

"Jones, Jane M. Rear 767-9, 53 x 50 3 \$265, vacant."

And upon the assessment roll of 1902:—

"Bathurst street.

"Vacant lot. Smith, Jane M. N1 pt. rear.

767-9, 53 x 7-5, 265.

"Vacant lot. Jones, Joseph. E. pt. rear.

Jones, Jane M. 767-9, 53 x 43-5, 265."

Bathurst street is a street running at right angles to and crossing Lennox street, and neither lot 19 nor lot 18 on the north side of Lennox street has any frontage on and neither lot touches Bathurst street.

In the list of lands liable to be sold for arrears of taxes in 1905, which is dated the 19th January, 1904, the land is described as being on the east side of Bathurst street, owned by Joseph and Jane Jones, in arrear for the taxes of 1901, 53 x 50 in size, and "rear Nos. 767 and 769."

In the assessor's return the land is stated to be owned by Angus Macdonell, 478 Dufferin street, to be then assessed on Lennox street, north side, S. pt. 18—25 x 53, and S.E. pt. 19, 17 x 53, included in one assessment of 42 x 53—and not occupied.

The learned trial Judge found that at the time the assessment was made the land was occupied and built upon, and held the sale invalid because the proceedings taken in the way of sale

*The defendant Jane M. Smith.

were those applicable to property which was vacant, and not built upon, and not to property which was in fact occupied and built upon.

In our opinion, the sale was invalid because there was no valid assessment of the land in the years 1901 and 1902, and therefore there were no taxes legally imposed for which it could be sold for taxes for those years.

Lots 18 and 19 were, as I have mentioned, lots fronting on Lennox street, and not fronting on or touching Bathurst street, and were not, therefore, the rear part of any lot on Bathurst street.

Such a description of the land assessed was not only inaccurate, but was so indefinite that it would be difficult, if not impossible, to ascertain what was the land intended to be assessed.

If the assessment could be treated as an assessment of lots 18 and 19, these, being separate and distinct parcels of a subdivision, a plan of which was registered, should have been assessed separately, and the joining of them in one assessment was improper, and the assessment was therefore invalid: *Christie v. Johnston* (1866), 12 Gr. 534.

I am inclined to think that the sale is invalid on another ground.

As the land was occupied by the appellant when the assessment was made, and was owned by a person not resident in this Province, who had not required her name to be entered on the assessment roll, it should have been assessed in the name of and against the appellant, and she, for the purpose of imposing and collecting taxes upon and from the land, was to be deemed the owner of it: R.S.O. 1897, ch. 224, sec. 22.

Had the assessor done his duty, the appellant would have been the person liable for the taxes for which the land was sold, and I do not see how, that being the case, she was entitled to become the purchaser at the tax sale, and by means of her purchase to deprive the owner of part of her land, which was sold because the taxes which, if the assessor had done his duty, would have been payable by the appellant, had not been paid.

Many of the objections which before the Assessment Act of 1904, 4 Edw. VII. ch. 23, would have been fatal to a tax deed,

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have been removed by sec. 172 of that Act, which was substituted for sec. 208 of the Revised Statute. This was done by the insertion after the word "shall" in the tenth line of sec. 208 the words "notwithstanding any neglect, omission or error of the municipality or of any agent or officer thereof in respect of imposing or levying the said taxes or in any proceedings subsequent thereto."

This change in the law renders many of the decided cases no longer applicable, but it does not cure a defect such as I have found to exist in the assessment for the years 1901 and 1902, the operation of the section being limited by the opening words of it to cases in which some part of the taxes for which the land was sold had at the time of the sale been in arrear for three years, and, that defect having rendered the assessment invalid, the imposition of a tax based upon it was, therefore, also invalid.

The mesne profits have been allowed on a liberal scale, but we cannot say that the amount awarded is so excessive as to justify our interference.

The appeal must be dismissed with costs.

[TEETZEL, J.]

NEWMAN V. GRAND TRUNK R.W. Co.

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Jan. 6

Railway—Carriage of Goods—Claim for Detention—Failure to Give Notice as Required by Condition of Contract—Construction—Misprint—"Or"—"Are."

Although the defendants were found guilty of negligence in unreasonably detaining and failing within a reasonable time to deliver a car-load of beans shipped by the plaintiff, an action to recover damages for that negligence was dismissed because the plaintiff had failed to give notice in writing and particulars of his claim for detention, to the station freight agent at or nearest to the place of delivery, within thirty-six hours after the goods were delivered.

The condition printed on the back of the shipping bill requiring such notice was one approved by the Board of Railway Commissioners, and read: "There shall be no claim for . . . detention of any goods . . . unless notice in writing and the particulars of the claim . . . are given . . . within thirty-six hours after the goods . . . or such portions of them as are not lost or delivered:"—

Held, that "or" should be read "are," for which it was obviously a misprint, and the condition so made effective.

ACTION for damages for breach of a contract. The facts are stated in the judgment.

October 21, 1909. The action was tried before TEETZEL, J., without a jury, at Chatham.

O. L. Lewis, K.C., and H. D. Smith, for the plaintiff.

W. E. Foster, for the defendants.

January 6. TEETZEL, J.:—On the 4th November, 1907, the plaintiff shipped a car-load of beans from Ridgetown to Montreal in one of the defendants' cars, which was in the possession of the Pere Marquette Railway Company, at Ridgetown. The shipping bill was issued by the Pere Marquette Railway Company, and the car was sent over its lines to London, and on the 7th November it was handed over to the defendant company for transmission to Montreal, but was not delivered at its proper place for unloading in Montreal until the 3rd December.

The plaintiff charges the defendants with negligence and breach of contract in failing to deliver the beans at Montreal with reasonable speed, and within a reasonable time after receipt thereof, and claims damages therefor.

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I find upon the evidence that, through their yardmaster at Montreal, the defendants were guilty of negligence in unreasonably detaining and failing within a reasonable time to deliver the car containing the plaintiff's beans at its proper destination, by reason of which the plaintiff suffered damage to the extent of \$313.13.

Upon the back of the shipping bill upon which the beans were intrusted to the defendants, which, as I have said, was issued by the Pere Marquette Railway Company, are a number of printed general terms and conditions, forming part of the contract, and which have been approved of by the Board of Railway Commissioners, one of which, number 12, reads:—

"12. There shall be no claim for damage to, loss of, or detention of, any goods for which the company is accountable, unless notice in writing and the particulars of the claim for sale loss, damage or detention, are given to the station freight agent at or nearest to the place of delivery within thirty-six hours after the goods in respect of which said claim is made, or such portions of them as are not lost or delivered."

If the proper construction of this condition is that the plaintiff was bound to give notice in writing and particulars of his claim for detention to the station freight agent at or nearest to the place of delivery within thirty-six hours after the goods were delivered, I would have to find upon the evidence that such notice was not given within the specified time.

The defendants contend that this is the proper construction of the condition, and rely upon this condition and its non-fulfilment as a defence to the action, under *Mercer v. Canadian Pacific R.W. Co.* (1908), 17 O.L.R. 585, and cases cited at p. 482 of Jacobs's *Railway Law of Canada*, by which it is well established that non-observance by a shipper of similar conditions as to notice of claim absolves the company from liability, so that the plaintiff's right to recover depends upon the proper construction of this condition.

Counsel for the plaintiff urged that the language of the condition does not bear the construction contended for by the defendants, and cannot be so interpreted without substituting the words "are delivered" for the words "or delivered" in the last

line, and that there is nothing in the context to warrant this being done.

With the words "or delivered" given their literal and grammatical interpretation, the language of the condition is entirely ineffective and meaningless, because there would be no period or event with which to implement the phrase "within thirty-six hours after," etc. Bearing in mind that the subject-matter to which the shipping bill, with its several terms and conditions, relates, is the carriage and delivery of the goods in question, I think the plain intention of the parties gathered from the context of the condition was to provide for a notice being given to the agent at or nearest the place of delivery within thirty-six hours after delivery, and that the word "or" was a misprint for the word "are." It is not possible to suggest any other event in reference to which, from the language used before we come to the words "or delivered," the words "within thirty-six hours after," etc., would be appropriate. The construction I place upon the condition involves eliminating the word "or" and interpolating in place thereof the word "are" before "delivered" in the last line, which I do because I think the use of the word "or" instead of "are" was a palpable mistake. Although the condition so construed has the effect of defeating the plaintiff's claim to redress for the defendants' negligence, I think I am bound by authority and well settled rules of construction to treat it in the manner indicated.

In *Stone v. Corporation of Yeovil* (1876), 1 C.P.D. 691, at p. 701, Brett, J., says: "It is a canon of construction that, if it be possible, effect must be given to every word of an Act of Parliament or other document; but that, if there is a word or a phrase therein to which no sensible meaning can be given, it must be eliminated."

In *In re Redfern* (1877), 6 Ch. D. 133, at p. 136, Bacon, V.-C., said: "Now, no doubt the mere letter of the will, or any other instrument, is not to be adhered to if a contrary significance can be suggested by the whole context of the instrument. The spirit is to prevail, and the letter is not to be allowed to kill. That I take to be a plain, clear canon of construction."

In discussing the subject of modification of the language to

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meet the intention in statutes—and I apprehend the same principles apply in construction of agreements—the following is stated in Maxwell on Interpretation of Statutes, 4th ed., p. 344: “Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar; by giving an unusual meaning to particular words; by altering their collocation; by rejecting them altogether; or by interpolating other words; under the influence, no doubt, of an irresistible conviction that the Legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language, and really give the true intention. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman’s unskillfulness or ignorance of law, except in a case of necessity, or the absolute intractability of the language used. The rules of grammar yield readily in such cases to those of common sense.”

In *Wilson v. Wilson* (1854), 5 H.L.C. 40, the Court struck out of an agreement one word and inserted another, because to use the word struck out was inconsistent with the rest of the agreement and led to an insensible and absurd reading. At p. 66, Lord St. Leonards said: “Now it is a great mistake if it is supposed that even a Court of law cannot correct a mistake, or error, on the face of an instrument: there is no magic in words. If you find a clear mistake, and it admits of no other construction, a Court of law as well as a Court of equity, without impugning any doctrine about correcting those things which can only be shewn by parol evidence to be mistakes—without, I say, going into those cases at all, both Courts of law and of equity may correct an obvious mistake on the face of an instrument without the slightest difficulty. I will give your Lordships an instance from a case in Douglas. A bond was executed with a condition that the bond was to be void if a party did *not* pay a sum of money at a given day. The man who had

given the bond insisted on a literal performance, just as the appellant does here, who says it is 'John' and not 'Mary' and I will have my bond, and nothing but my bond. So this man said, the condition is if I do not pay, and I have not paid, and therefore the bond is void. But what did the Court of law say? That it was an obvious error, and therefore the 'not' was to be rejected, and that the bond was to be void if the man did pay."

In *Key v. Key* (1853), 4 DeG. M. & G. 73, at p. 84, Lord Justice Knight Bruce said: "In common with all men, I must acknowledge that there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly."

Words omitted were inserted by the Court in order to make the reading sensible and consistent with the apparent intention of the whole agreement, in *Mourmand v. Le Clair*, [1903] 2 K.B. 216; *Grannell v. Monck* (1889), 24 L.R. Ir. 241; and *Coles v. Hulme* (1828), 8 B. & C. 568.

In the result, therefore, I am of opinion that this action must be dismissed, but it is not a case for costs.

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SELKIRK V. WINDSOR ESSEX AND LAKE SHORE RAPID R.W. CO.

Jan. 8.

Company—Electric Railway Company—Powers of Provisional Directors—Contract with Promoters of Rival Railway—Electric Railway Act, sec. 44—Contract Made by Officers of Unorganised Company—Misrepresentation of Fact—Damages.

The provisional directors of the defendant company, incorporated by 1 Edw. VII. ch. 92 (O.), to build an electric railway, gave power to their president and secretary to make a bargain with the plaintiffs, who were promoting a rival electric railway. A bargain was made, and the result reported to the provisional directors, who ratified what had been done. The contract purported to be made between the defendant company and the plaintiffs; the plaintiffs were to cease operations in support of any other rival railway and to assist the defendant company in securing franchises, etc., and were to receive \$1,000. The plaintiffs carried out their part of the bargain, and now sued the company for the \$1,000, asking in the alternative damages for misrepresentation against the president and secretary, who were joined as defendants. The defendant company had not been organised at the time of the contract; but the president and secretary believed that the company had power to enter into the contract; and they represented to the plaintiffs, and the plaintiffs believed, that they had power to make the contract. The president and secretary were guilty of no fraud. The Act of incorporation provided (sec. 12) that the several clauses of the Railway Act should be incorporated with and be deemed to be part of the Act of incorporation:—

Held, having regard to the provisions of sec. 44 of the Electric Railway Act, R.S.O. 1897, ch. 209, that the provisional directors had no power to enter into the contract, and the contract was not binding on the company, nothing having been done to ratify it.

Held, however, that, as the power of the company to enter into such a contract was not excluded by its Act of incorporation, but depended upon facts as to organisation, etc., the representation of the president and secretary was not as to law, but as to fact, and they were liable to the plaintiffs therefor.

Struthers v. Mackenzie (1897), 28 O.R. 381, distinguished.

ACTION against the railway company to enforce a contract purporting to be made on behalf of the company, with the plaintiffs, by the defendants Newman and Nelles, as president and secretary; and against the latter defendants, in the alternative, for damages for misrepresentation. The facts are stated in the judgment.

December 20, 1909. The action was tried before RIDDELL, J., without a jury, at Sandwich.

A. H. Clarke, K.C., for the plaintiffs.

J. M. Pike, K.C., for the defendant company.

E. S. Wigle, K.C., for the defendants Newman and Nelles.

January 8. RIDDELL, J.:—The Essex and Kent Radial Railway Company was incorporated by (1901) 1 Edw. VII. ch. 78(O.), to build an electric railway. This Act was amended by (1902) 2 Edw. VII. ch. 72. The plaintiffs were the two persons most active in promoting this railway and in opposing its rival now to be mentioned.

The Windsor Essex and Lake Shore Rapid Railway Company was incorporated by (1901) 1 Edw. VII. ch. 92 (O.), for the like purpose; the defendant Newman being one of the incorporators. The Act was amended by (1904) 4 Edw. VII. ch. 95, and (1905) 5 Edw. VII. ch. 110. The Dominion assumed jurisdiction in 1906, it is said.

In January, 1904, the promoters of the latter railway project found themselves checked at many points by the plaintiffs. The provisional directors of that company gave power to the defendants, their president and secretary, to make a bargain with the plaintiffs—and they did so, reporting the result to the provisional board, and the board ratifying what had been done.

The contract purports to be made between the Windsor Essex and Lake Shore Rapid Railway Company and the plaintiffs—the plaintiffs are to cease all operations in support of any other electric railway in opposition to the Windsor Essex and Lake Shore Rapid Railway Company, and to assist the latter company in securing franchises, etc., receiving \$500 when the road is running from Windsor to Essex, and another \$500 when from Windsor to Leamington.

There were no misrepresentations by the plaintiffs, and they were acting for themselves, and not for the Essex and Kent Radial Railway Company, and were guilty of no breach of trust in making the contract; and they have fully carried out their part thereof.

The defendant company had not been organised at the time of this contract, though both Newman and Nelles believed that the company had the power to enter into the contract; and they represented to the plaintiffs that they had the power to make the contract in question. The plaintiffs believed them.

Newman and Nelles were guilty of no fraud in so represent-

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ing their powers, as they believed that what had taken place justified them in making the contract.

The road being completed, this action is brought against the company and also against Newman and Nelles—these have long severed all connection with the company, having sold out all interest in it.

As to the company's position, there has been nothing done in any way to ratify the contract; and, consequently, unless the Act of the provisional board binds the company, the company is not liable.

In the Act of incorporation—(1901) 1 Edw. VII. ch. 92—sec. 12 provides that “the several clauses of the Electric Railway Act . . . shall be incorporated with and be deemed to be part of this Act, and shall apply to the company and to the railway. . . .”

The Electric Railway Act, R.S.O. 1897, ch. 209, provides, sec. 44, that the provisional directors may: (1) open stock books and procure subscriptions of stock; (2) receive payment on account; (3) cause plans and surveys to be made; (4) shall deposit in a chartered bank all moneys received on account of stock; (5) may fill vacancies in the board; “but the provisional directors shall have no powers other than those given by this clause, or in terms conferred on provisional directors by the express words of this Act.” There is no power in terms conferred by the Act on provisional directors to enter into such a contract as this. Consequently, no such power existed with the provisional directors; and the contract is not binding upon the company. The general law is considered in such cases as *United Counties of Peterborough and Victoria v. Grand Trunk R.W. Co.* (1859), 18 U.C.R. 220; *Michie v. Erie and Huron R.W. Co.* (1876), 26 C.P. 566; *Thomson v. Feeley* (1877), 41 U.C.R. 229; *Re Wakefield Mica Co.* (1906), 7 O.W.R. 104 (C.A.); *Lindley on Companies*, 6th ed., bk. II., ch. 1.

As to Newman and Nelles, it is sought to make them liable upon the ground of misrepresentation. The case of *Struthers v. Mackenzie* (1897), 28 O.R. 381, is relied upon in their defence—the argument being that the company, for whom they purported to contract, had no power to contract. *Struthers v. Mackenzie*

was an action against the officers of a co-operative association incorporated under R.S.O. 1887, ch. 166, whereby the association was authorised to carry on a cash business only. The plaintiffs had sold goods to the association on credit, and drew upon the association—the drafts were “accepted for the co-operative association” by G. H., the treasurer thereof, under general instructions from the board of directors. The drafts were not paid, and the plaintiffs brought this action against Mackenzie, the manager, G. H., the treasurer, and the directors, claiming that they were personally liable. The action was dismissed by the Chancellor, and his judgment affirmed by the Queen’s Bench Divisional Court. It was pointed out that, selling to a co-operative association, the plaintiffs must be held to have known from its very name that it could not buy on credit—that there was no express representation of the authority of the association to buy goods on credit, and that the only implied representation was an implied representation of law, not of fact; upon an implied representation of law no action lies, under *Beattie v. Lord Ebury* (1872), L.R. 7 Ch. 777.

The present is not quite the same case.

The company as a company was not incapacitated from making such a contract, in fact—the company was not at the time of the contract in a condition to make the contract because it had not then become organised. There was nothing in the name of the company to cause the plaintiffs to believe that it could not make the contract. Then as to the representation—had the defendants Newman and Nelles stated to the plaintiffs the actual condition of the company, so that the plaintiffs could judge as well as themselves, then any representation as to the powers of the company would have been a misrepresentation of law. This is not what they did; they represented that the company could enter into such a contract. Remembering that the power of the company so to do was not excluded by its Act of incorporation, but depended upon facts as to organisation, etc., this was not a representation as to law, but a representation as to fact.

Beauchamp v. Winn (1873), L.R. 6 H.L. 223, especially at p. 234, may be looked at on a cognate subject.

In *Cherry v. Colonial Bank of Australasia* (1869), L.R. 3

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P.C. 24, two directors of a joint stock company gave authority to their manager to overdraw cheques on account of the company—and wrote to the plaintiffs, the Colonial Bank, accordingly. The two directors did not form the majority of the board, and consequently could not give any such authority so as to bind the company. The company did not pay the overdraft, and the bank sued the two directors and recovered, the judgment being affirmed in the Privy Council, notwithstanding the argument that the representation by the defendants was one of law. (There was no imputation of fraud in the transaction: p. 31.)

This is not quite the same case as the present, but there are analogies.

In *Weeks v. Propert* (1873), L.R. 8 C.P. 427, the directors of a railway company had fully exercised their borrowing powers under their special Act, and then borrowed a further sum of £500 for the company from W. W. A debenture therefor was issued to the plaintiff, W. W.'s executor, which by the Court of Chancery was declared void as being in excess of the borrowing powers of the railway company. The defendant was a director of the railway company who was a party to the transactions; and it was held by the Court of Common Pleas that he was liable, and that irrespective of any allegation of fraud. Keating, J., says (p. 436): "They (*i.e.*, the directors) might have considered . . . that they were authorised to borrow money. . . But they held themselves out as competent to take up this money from W. W. . . when they had no such authority. Their warranty consequently is broken, and they are personally liable. . ." Honyman, J., agreeing, said (p. 437), citing Willes, J., in *Collen v. Wright* (1857), 8 E. & B. 647, at p. 657: "The fact that the professed agent honestly thinks he has authority affects the moral character of his act; but his moral innocence . . . in no way . . . alleviates the . . . damage. . ." This case is nearer ours—the company was not prevented by its constitution from borrowing any more than the defendant company here was prevented by its constitution from making the contract sued on—the directors in each case acted honestly, intending to bind, and thinking they did bind, the company. They did not bind the company, and consequently they themselves are liable.

I do not go through the case of *Beattie v. Lord Ebury*, L.R. 7 Ch. 777, (1874), L.R. 7 H.L. 102; it is discussed in many of the later cases, but I find nothing in it at all adverse to the opinion I have come to.

Chitty on Contracts, 15th ed., pp. 276, 277, contains a reference to a number of cases more or less in point.

I think the action should be dismissed against the company, but without costs, and judgment entered for the sum of \$1,000 against the defendants Newman and Nelles with costs.

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Criminal Law—Certiorari—Status of Prosecutor as Applicant—Identification with Crown—Rules of Court—Recognizance—Time for Moving—Magistrates' Order for Payment of Costs by Prosecutor—Warrant for Arrest—Jurisdiction.

Rules 1279 *et seq.*, made by the Supreme Court of Judicature for Ontario on the 27th March, 1908, pursuant to secs. 576 and 1126 of the Criminal Code, requiring among other things, a recognizance or deposit in all cases in which it is desired to move to quash a conviction, order, warrant, or inquisition, do not apply where the prosecutor is moving for a *certiorari*; the prosecutor in effect moves on behalf of the Crown, and the Crown is not bound by the Rules, not being expressly named.

Where magistrates, having dismissed a complaint under the Indian Act, ordered that the costs should be paid by the prosecutor; and a warrant was issued by one of the magistrates for the arrest of the prosecutor and for his imprisonment for thirty days unless the costs were sooner paid:—*Held*, that the prosecutor was entitled to a *certiorari* to remove the order and all the proceedings into the High Court, although he had not given security by recognizance or deposit, and the application was not made within six months, as required by the Rules.

Order of BRITTON, J., reversed.

MOTION by William Martin for an order for the issue of a writ of *certiorari*, in the circumstances mentioned in the judgments.

The motion was heard by BRITTON, J., in Chambers, on the 26th October, 1909.

J. B. Mackenzie, for the applicant.

H. W. Shapley, *contra*.

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November 13. BRITTON, J.:—On the 15th May, 1908, William Martin laid before Albert E. Harris, a justice of the peace for the county of Brant, an information and complaint that David Garlow, on or about the 4th March, 1908, had in his possession a bottle of whisky on Indian Reserve, and was drunk on Indian Reserve, contrary to the provisions of the Indian Act.

Apparently this charge was heard by two justices of the peace, of whom Albert E. Harris was one, and on the 6th June, 1908, the charge was dismissed, and the complainant, William Martin, was ordered to pay the costs, amounting to \$14.

On the 4th September, 1908, the justice of the peace, Harris, issued a warrant for the arrest of Martin and for his imprisonment for thirty days unless the costs and the further costs of commitment and conveying Martin to gaol were sooner paid. On this warrant Martin was arrested, and upon his arrest he paid the costs.

It does not appear just when the costs were paid, but Martin was committed to gaol on the 11th August, 1909.

On the 1st October, 1909, Martin served notice of motion, reciting the order of the 4th September, 1908, dismissing the information and complaint, for a writ of *certiorari* for the removal of such order and all things pertaining to the same into this Court. The notice of motion alleges that the magistrate Harris acted alone when dealing with this complaint, and so acted without jurisdiction, and for this reason, besides others, the order of dismissal was illegal.

The affidavits filed in answer to this motion satisfy me that the magistrate Harris did not act alone in making the order of dismissal. That order was made by two justices, viz., Albert E. Harris and Thomas Hunter.

It was contended by Mr. Mackenzie that a prosecutor is in no way affected by the Rules of Court in regard to *certiorari*. These Rules have not been complied with; no recognizance has been entered into or filed, and no deposit has been made by the informant. I am not able to agree with the applicant's contention. The Rules, in terms, clearly apply and are operative against the prosecutor, who, in this case, cannot be said to be really acting on behalf of the Crown.

Section 1126 of the Criminal Code* does not make any distinction between prosecutor and defendant as to what the Court may order and direct before a motion to quash will be entertained. A general order has been made requiring a recognizance or deposit.

Section 576 of the Code gives power to the Supreme Court of Judicature for Ontario to make Rules . . . (b) "for regulating in criminal matters the pleading, practice and procedure in the court including the subjects of *mandamus*, *certiorari*, *habeas corpus*, prohibition, *quo warranto*, bail and costs" Such Rules were made on the 27th March, 1908. They were laid before both Houses of Parliament, and have been published in the Canada Gazette: see vol. 41, p. 3160. The Ontario statute 8 Edw. VII. ch. 34, makes similar provision.

As I have said, the prosecutor's case, on a motion to set aside a warrant for commitment for non-payment of costs, can not be treated as the case of the King.

Upon all the facts and circumstances of this case, the motion will be dismissed without costs.

William Martin appealed from the order of BRITTON, J., and his appeal was heard on the 13th and 14th December, 1909, by a Divisional Court composed of MULOCK, C.J.Ex.D., CLUTE and SUTHERLAND, JJ.

J. B. Mackenzie, for the appellant. Under the Rules of Court for the regulation of criminal matters passed on the 27th March, 1908, the applicant for *certiorari* is bound to move within six months after the conviction complained of, and to enter into a recognizance in \$100, or to make a deposit of that amount. It is admitted that these requirements have not been complied

*1126. The court having authority to quash any conviction, order or other proceeding by or before a justice may prescribe by general order that no motion to quash any conviction, order or other proceeding by or before a justice, brought before such court by *certiorari*, shall be entertained unless the defendant is shewn to have entered into a recognizance with one or more sufficient sureties, before a justice or justices of the county or place within which such conviction or order has been made . . . as may be prescribed by such general order, or to have made a deposit to be prescribed in like manner, with a condition to prosecute such writ of *certiorari* at his own costs and charges, without any wilful or affected delay, and, if ordered so to do, to pay the person in whose favour the conviction, order or other proceeding is affirmed, his full costs and charges. . . .

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with in the present case, and that, if these Rules are applicable to it, the appellant's case must fail. It is submitted, however, that these Rules do not apply to an application made on behalf of a prosecutor, as it is made in effect on behalf of the Crown, which cannot be restrained from removing proceedings by *certiorari* unless the prohibition appears by express words or manifest intention. I refer to *Regina v. Nunn* (1884), 10 P.R. 395, at p. 396, approving *The Queen v. Spencer* (1839), 9 A. & E. 485; *Regina v. Swalwell* (1886), 12 O.R. 391; *In re Murphy and Cornish* (1881), 8 P.R. 420, at p. 423, approved in *Regina v. Toronto Public School Board* (1900), 31 O.R. 457; *The Queen v. Murray* (1867), 27 U.C.R. 134; *Regina v. Becker* (1891), 20 O.R. 676. The order and subsequent proceedings were not within the jurisdiction of the magistrate or magistrates.

H. W. Shapley, for the magistrates. The prosecutor is bound by the Rules of March, 1908, which are expressed in plain and unmistakable terms, and are subject to no such exception as contended for on behalf of the appellant.

January 10. The judgment of the Court was delivered by CLUTE, J.:—Section 1126 of the Criminal Code provides that the Court may prescribe by general order that no motion to quash any conviction, order or other proceeding by or before a justice, brought before such court by *certiorari*, shall be entertained unless the defendant is shewn to have entered into a recognizance, etc., as may be prescribed by such general order, or to have made a deposit to be prescribed in like manner, etc.

The Rule passed on the 17th November, 1886, in pursuance of the original of the above section, provided that no motion shall be entertained to quash a conviction, order, or other proceeding which has been made by or before a justice of the peace, and brought before the Court by *certiorari*, unless the defendant is shewn to have entered into a recognizance, with one or more sufficient sureties, in the sum of \$100, etc., or unless he is shewn to have made a deposit of the like sum of \$100 with the Registrar of the Court in which such motion is made. See *Holmstead and Langton's Judicature Act*, p. 1454.

On the 27th March, 1908, certain Rules were passed providing

(1279) that in all cases in which it is desired to move to quash a conviction, order, warrant or inquisition, the proceeding shall be by a notice of motion in the first instance instead of by *certiorari*, or by rule or order *nisi*. Rule 1280 provides for the service, at least six days before the return day thereof, upon the magistrate or justice of the peace. Rule 1281 provides for a notice to be indorsed addressed to the magistrate to return the proceedings. Rule 1285 provides that the motion shall not be entertained unless the return day thereof be within six months after the conviction, order, warrant or inquisition, or unless the applicant is shewn to have entered into a recognizance in the sum of \$100 as required, or to have deposited \$100 with the Registrar of the Court in which such motion is made. Rule 1287 provides that an appeal shall lie from the order of the Judge to a Divisional Court, if leave be granted by a Judge of the High Court. And Rule 1288 repeals the Rule above mentioned made on the 17th November, 1886.

In the present case security has not been given, and the application is not made within the six months required by the Rules.

But it is contended that, the application being on behalf of the prosecutor, security is not required; that it is in effect a motion on behalf of the Crown, which is not limited by time nor required to give security. Even where a statute in express terms declares that the proceedings shall not be removed by *certiorari*, this does not prevent it issuing at the suit of the prosecutor on behalf of the Crown; for to restrain the prerogative of the Crown in this particular there must be express words for that purpose or an intention manifestly appearing upon the Act that the Crown, as well as the subject, shall be prohibited from removing the proceedings: Paley on Convictions, 8th ed., p. 448; *The King v. Allen* (1812), 15 East 333, 341-2.

In *The King v. Battams* (1801), 1 East 298, it was held that a *certiorari* to remove an indictment from the Sessions may be sued out by the prosecutor, without giving the six days' previous notice required by the statute 13 Geo. II. ch. 18, sec. 5. Lord Kenyon, C.J., referred to the case of *Rex v. Farewell* (1744), 2 Stra. 1209, in which Lord Chief Justice Lee said

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“that he had never known an instance where an affidavit in such a case was ever made or expected from a prosecutor, or any recognizance ever entered into.” That was in regard to a highway, where an affidavit was required that the right of repair would come in question pursuant to the statute 5 & 6 W. & M. ch. 11, and Lord Kenyon remarks that “it is true the decision there was not upon the particular statute in question, but it was made upon a general review of the subject.”

In *The King v. Allen* a similar question arose under 48 Geo. III. ch. 74, which gave to the party aggrieved an appeal to the Sessions against a conviction by justices of the peace for penalties incurred in respect of the duties on malt, and empowered the Sessions “to hear and finally determine of and concerning the truth of the facts and merits of the case in question between the parties to such conviction respectively,” and declared that no *certiorari* shall be allowed to set aside the determination of the Sessions. It was held that this provision did not preclude the Crown from removing the conviction, and the order of the Sessions quashing the same, by *certiorari*. Grose, J., said (p. 340): “The question is whether the Act of 48 Geo. III. intended to take from the Crown the power of removing this conviction by *certiorari*; for it is clear that unless the Act has plainly said so, the power of the Crown is not restrained. There are no words expressly taking it away. Then was it the clear intention of the Legislature so to do?” Le Blanc, J. (p. 341): “If on looking into any Act which takes away the writ of *certiorari* in a particular instance, the Court does not see that the Crown was intended to be barred, they will not restrain it.”

In *The Queen v. Spencer*, 9 A. & E. 485, it was held that the enactment of 5 Geo. II. ch. 19, sec. 2, that orders of justices shall not be removed by *certiorari* unless recognizance be given by the party removing, does not apply to writs of *certiorari* sued out by a prosecutor; and, therefore, where a conviction had been quashed by order of Sessions, and the informer obtained a *certiorari* to remove such order, the Court refused to quash the writ on the ground that no recognizances had been given. Lord Denman, C.J., said: “The view of the Court has been that this section applied only where the defendant removed the order; and the

practice has been grounded upon that. We ought not now to interfere with it."

In *The King v. Boulton* (1836), 4 A. & E. 498, it was held that the rule that a statute taking away *certiorari* does not bind the Crown unless named, is not limited to cases where the Crown has an actual interest, but extends to all prosecutions in the name of the King; and the rule in favour of the Crown is not defeated by the prosecutor having become nominally defendant; as where a conviction has been quashed at Sessions, with costs to be paid by the prosecutor, and he seeks to quash the order of Sessions. The words of the Act under which this decision is made are very broad. They are, that no summary conviction in pursuance of this Act, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by *certiorari* or otherwise into any of His Majesty's Superior Courts of Record. Denman, C.J., in referring to this section, says: "If there had been no decision upon similar clauses in other statutes, it would appear that such a provision bound even the Crown. But it has often been held that the right of the Crown in such cases is not to be taken away unless by express words. In *Rex v. Bodenham* (1774), 1 Cowp. 78, a distinction was attempted between cases in which the proceeding is actually that of the King, as where the revenue is concerned, and those in which the prosecution is private; and the Court said: 'In cases of this sort there is no distinction.' That is a direct authority on the point." Little-dale, J., said: "The general rule is, that the Crown, unless named, is not bound by a statute; and that, in the cases which have been cited, it has been held applicable to clauses taking away *certiorari*. A distinction has been suggested between cases in which the Attorney-General is proceeding directly on behalf of the Crown, or a private prosecutor to enforce a conviction, and where a party, as in this instance, is endeavouring to get rid of the costs of a prosecution in which he has failed, and stands in the situation of a defendant; but that appears to me too refined; although the party is called the defendant, that is only by the course of the Court; he is still, in fact, the prosecutor in the proceeding below." Williams, J., was to the same effect, pointing out that the distinction had been overruled in the case of *Rex v. Bodenham*, *supra*.

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In *Regina v. Nunn*, 10 P.R. 395, the motion was for the discharge of the prisoner on return of writs of *habeas corpus* and *certiorari*. Objection was made to the return to the writ of *certiorari* being filed, as no recognizance had been entered into. Rose, J., after pointing out that sec. 8, ch. 70, R.S.O. 1877, did not require a recognizance; that the return was made for the assistance of the Court; added: "The recognizance provided for by 5 and 13 Geo. II. was not required in applications by the prosecutor or the Attorney-General *ex officio*," citing the *Spencer* case.

While the language of the Rule requiring security would seem to be broad enough to cover the present case, if the question were now up for the first time for decision, I think the authorities are binding upon me, and that I must hold that in a case of a prosecutor a recognizance is not required.

Nor do I think the other requirements of the Rules apply where the application is by a prosecutor. See *The Queen v. Murray*, 27 U.C.R. 134, where Morrison, J., says: "As to the objection of want of notice to the justice of the application for the *certiorari*, it is laid down in Paley on Convictions, and clear upon authority, that where the application for the writ is made by the private prosecutor it issues of course, and without assigning any grounds, nor is any notice, etc., necessary." And reference is made to *The King v. Battams*, 1 East 298, 303, above cited.

Then is it a case where, upon the merits, a *certiorari* should issue? I think it is. It would appear that in the proceeding below the magistrate, having dismissed the prosecution under the Indian Act, fixed the costs and issued a warrant for the arrest of the prosecutor in the first instance, who, it is alleged, was arrested, and paid the amount under protest, and was thereupon released. This objection was not taken in the Court below. The only objection there taken was that only one magistrate had sat upon the case, which, being one under the Indian Act, required two. It was found in the Court below by my brother Britton that two magistrates did in fact sit upon the case. The principal objection now relied upon was not taken. We must, however, I think, give effect to the objection, although taken now for the first time: *Regina v. Becker*, 20 O.R. 676; *Garrett v. Roberts* (1884), 10 A.R. 650, 652.

I am of opinion that the *certiorari* should issue.

[DIVISIONAL COURT.]

BROOKS-SANFORD CO. v. THEODORE TELIER CONSTRUCTION CO.

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Jan. 17.

Mechanics' Liens—Material-man—Preservation of Lien—Last Delivery—Articles Used for Temporary Purpose—Contract—Registry of Lien—Time—Acceptance and Discounting of Promissory Note—Mechanics' and Wage Earners' Lien Act, secs. 4, 22(2), 28.

The lien of a material-man under the Mechanics' and Wage Earners' Lien Act is for materials furnished to be used in the building (sec. 4); and where the plaintiffs had contracted to supply the hardware for use in the construction of a building, and the last delivery was of certain bolts of trifling value, and used for a temporary or experimental purpose only:—

Held, that the delivery was under the contract, and that the lien for all the materials supplied was preserved by registry of the claim therefor within thirty days from the delivery of the bolts, although, if that had not been regarded, the registry would have been too late: sec. 22(2).

Rathbone v. Michael (1909), 19 O.L.R. 428, distinguished.

Held, also, MAGEE, J., dissenting, that, having regard to sec. 28 of the Act, the material-men had not lost their lien by accepting from the contractors, in part payment of their account, a promissory note which they discounted with their bankers, and which had come back into their hands unpaid prior to the registry of their claim of lien.

Edmonds v. Tiernan (1892), 21 S.C.R. 406, distinguished.

APPEAL by the plaintiffs in an action under the Mechanics' and Wage Earners' Lien Act, R.S.O. 1897, ch. 153, from the judgment of Mr. J. A. C. Cameron, an Official Referee, whereby the action, as against the defendants Frankel Brothers, was dismissed with costs.

The plaintiffs supplied the defendants the Theodore Telier Construction Co. with certain hardware for use in the construction of a building for Frankel Brothers. The last delivery was on the 1st April, 1908, within thirty days of the filing of the lien.* It was of expansion bolts to the value of 84 cents, required for use in connection with guards to an elevator shaft. The elevator was installed without gates, but otherwise it was completed in October, 1907. After January, 1908, little remained to be done by the Telier Co. under their contract. Frankel Brothers insisted that defective concrete should be replaced or repaired, and that the elevator should be properly safeguarded.

*By sec. 22, sub-sec. 2, of the Act, a claim for lien for materials may be registered before or during the furnishing or placing thereof or within thirty days after the furnishing or placing of the last material so furnished and placed.

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There were structural difficulties preventing, it was thought, the installation of gates, and Mr. Wolff, the Telier Co.'s superintendent, was endeavouring to provide guards that would serve the same purpose. In installing a working model of the proposed device he required four bolts to secure to a brick wall a plate to which one of the guards was attached. The bolts were delivered to him at the building and used by him there. The learned Referee considered that the contract did not call for gates, and that, as the bolts were used but for a temporary or experimental purpose, the supplying of them by the plaintiffs had not the effect of keeping alive the plaintiffs' lien.

The appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ., on the 10th November, 1909.

R. G. Smythe, for the plaintiffs. The first ground on which the Official Referee based his judgment was that the delivery of the bolts on the 1st April, 1908, did not have the effect of keeping the plaintiffs' lien alive, inasmuch as they were merely intended for a model, and not for permanent use in connection with the elevator, but in the case of a material-man it does not matter whether the materials furnished are used for a temporary or a permanent purpose, so long as they are ordered by the contractor in pursuance of an agreement with the owner, and "placed or furnished to be used" on the land in respect of which the lien is claimed, nor does it matter whether they are incorporated in the building or not: R.S.O. 1897, ch. 153, sec. 4; *Larkin v. Larkin* (1900), 32 O.R. 80, at p. 89. The Referee also based his judgment on the ground that the specifications did not call for gates for the elevator, and that the owners could not have compelled the contractors to supply anything in substitution; but what was done was in completion of the contract, which provided that the elevators were to be fully guaranteed and to be according to law and the city authorities. In this connection the Ontario Factories Act, R.S.O. 1897, ch. 256, sec. 20(1)(c), was referred to. The following authorities were cited: *Slattery v. Lillis* (1905), 10 O.L.R. 697, at p. 703; *Barrington v. Martin* (1908), 16 O.L.R. 635; *Morris v. Tharle* (1893), 24 O.R. 159;

McArthur v. Dewar (1885) 3 Man. L.R. 72; Wallace's Mechanics' Lien Laws in Canada, p. 78; *Hercules Powder Co. v. Knoxville Lafollette and Jellico R.W. Co.* (1904), 67 L.R.A. 487, at pp. 494, 495; Phillips on Mechanics' Liens, 2nd ed., secs. 148, 149; *Rapauno Chemical Co. v. Greenfield and Northern R.W. Co.* (1894), 59 Mo. App. 6, at p. 7.

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Casey Wood, for the defendants Frankel Brothers. The evidence shews that the contract was completed early in January, 1908, when these defendants went into possession, and that no gates were ordered for the elevator. The lien of the material-man depends upon that of the contractor, and must be found within the four corners of the contract. There was no intention that the model should ever form a permanent part of the building, and the material for it was not supplied under the original contract, but under a new contract, so that the lien for it, if any exists, must be limited to the value of that material: *Rathbone v. Michael* (1909), 19 O.L.R. 428. The plaintiffs had lost their right to a lien by accepting a promissory note from the Telier Co., which they had discounted with their bankers: *Edmonds v. Tiernan* (1892), 21 S.C.R. 406.

Smythe, in reply. *Edmonds v. Tiernan* is a case based on the British Columbia statute, and is not an authority in this Province, in view of sec. 28 of our Act. As to the alleged subsequent contract, he referred to Am. and Eng. Encyc. of Law, 2nd ed., vol. 20, p. 361, and the cases there cited.

January 17. LATCHFORD, J. (after setting out the facts as above):—With the conclusion of the Referee I find myself unable to agree. The specifications which form part of the contract provide for an elevator “according to laws, elevator underwriters, and city authorities.” Mr. Leo Frankel insisted that gates or guards should be provided in accordance with the contract, and as required by a by-law of the city of Toronto. The goods supplied by the plaintiffs were not furnished by them in connection with a separate contract, as in *Rathbone v. Michael*, 19 O.L.R. 428; but to be used in the carrying out of the original contract between the Telier Co. and Frankel Brothers. I do not consider it material that the bolts may have been used for

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a temporary or experimental purpose. They were "furnished . . . to be used" in the building of the defendants Frankel Brothers, and were actually used therein: *Larkin v. Larkin*, 32 O.R. 80, at p. 97; and a lien attaches under sec. 4 of the Act.

But it is argued, upon the authority of *Edmonds v. Tiernan*, 21 S.C.R. 406, that the plaintiffs lost their lien by accepting from the Telier Co., in part payment of their account, a promissory note which they discounted with their bankers, and which had come back into their hands unpaid prior to the registration of their claim of lien. Whether the *Edmonds* case arose under ch. 74, Consolidated Acts of British Columbia, 1888, or the Mechanics' Lien Act of 1891, 54 Vict. ch. 23 (B.C.), does not appear from the reports; but neither statute contained a clause similar to that enacted in Ontario in 1896 (59 Vict. ch. 35, sec. 26, sub-sec. (5), now R.S.O. 1897, ch. 153, sec. 28), which provides that "the acceptance of any promissory note for . . . the claim . . . shall not . . . prejudice or destroy any lien created by this Act, unless the lien-holder agrees in writing that it shall have that effect." It has been held in Manitoba, *National Supply Co. v. Horrobin* (1906), 16 Man. L.R. 472, that, notwithstanding a similar provision, R.S.M. 1902, ch. 110, sec. 24, sub-sec. (c); the right of lien is discharged by accepting and discounting a promissory note. Another Manitoba decision to the same effect is *Arbuthnot v. Winnipeg Manufacturing Co.* (1906), 16 Man. L.R. 401. But in the latter case the promissory note was under discount at the time the plaintiffs filed their claim for lien. The defendants could not be liable to the company under the statute, and at the same time to the contractors' banker upon the promissory note. "While the note is in the hands of a third party no proceedings can be taken to enforce the lien. If the lien claimant pays the note and is the holder of the note at the time he begins proceedings, the fact of his having negotiated the note will not take away his lien:" Wallace's Mechanics' Lien Laws in Canada, p. 150. In *National Supply Co. v. Horrobin* it does not clearly appear from the report whether the notes given to the company were or were not under discount at the time the lien was filed, or had previously, as in the present case, passed back into the hands of the plaintiffs.

The Supreme Court of British Columbia had occasion recently to deal with the point in issue in *Coughlin & Co. Limited v. National Construction Co.* (1909), 11 W.L.R. 491. Irving, J., after citing sec. 25 of the British Columbia statute 64 Vict. ch. 20, which is practically identical with sec. 28 of the Ontario Act, says: "To my mind, it would render the statute nugatory if we were to put on this section the interpretation contended for by the appellants on the authority of two Manitoba cases. I prefer the reasoning of the Alberta Court in *Swanson v. Mollison* (1907), 6 W.L.R. 678; *Clarke v. Moore* (1908), 1 Alta. L.R. 49, 8 W.L.R. 405, at p. 411; *Gorman v. Archibald* (1908), 1 Alta. L.R. 524, 8 W.L.R. 916." The Manitoba cases are not cited, but they are, no doubt, the cases I have mentioned. In *Swanson v. Mollison* several promissory notes had been given by the contractor to the plaintiffs upon their general account. The total indebtedness of the contractor to the plaintiffs had never been covered by the promissory notes, although the exact amount uncovered was not stated. "In these circumstances," Mr. Justice Stuart says, at p. 682: "I doubt very much, quite apart from the provisions of sec. 7 of the Act, if the case of *Edmonds v. Tiernan*, 21 S.C.R. 406, would apply." He proceeds: "The defendants referred also to the case of *National Supply Co. v. Horrobin*, 16 Man. L.R. 472, 4 W.L.R. 570, in which Mathers, J., held that a provision in the Manitoba Act, similar to that in our sec. 7, did not save the lien where the note had been discounted. If it were necessary here to decide the point, I would hesitate considerably before following that case." The learned Judge considered further that sec. 7 of the Act enabled him to distinguish *Edmonds v. Tiernan* from the case before him, and gave judgment in favour of the plaintiffs.

In *Clarke v. Moore* Harvey, J., says, 8 W.L.R. at p. 409: "If *Edmonds v. Tiernan* rests on the view that the negotiation of a note establishes the fact of payment of the note, I think that is not now applicable. It appears to me that sec. 7 now clearly settles that question, and the taking of a note is not, under any circumstances, to be deemed payment."

It seems to me that if the British Columbia statute under which *Edmonds v. Tiernan* was decided contained, as the statutes

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of that Province now contain, provisions similar to those of sec. 28 of the Ontario Act, the decision of the Supreme Court of Canada would have been different. The case has not been followed by the Supreme Court of British Columbia, and has no application in this Province, owing to the provisions of sec. 28 of the Ontario Act. The plaintiffs' lien was not prejudiced or destroyed by the taking of the Telier Co.'s note and the discounting of it. When the note was returned to them unpaid by their bank, they were entitled to rely on their original account, and to file a lien for that and the goods afterwards supplied.

In my opinion, the appeal should be allowed with costs.

BOYD, C.:—"Materials" includes every kind of movable property (Act, sec. 2(5)). The lien is given to any one who places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving or repairing any erection, building, . . . land . . . trestlework . . . or the appurtenances to any of them, for any owner, contractor, etc., and he shall by virtue thereof have a lien upon the lands upon which the materials are placed or furnished to be used (Act, sec. 4).

Very wide words, and applicable, as I read them, to materials for use either temporarily or permanently, either of a preparatory or of an experimental character, so long as they go to or go into or are furnished to be used upon the structure. The things so *bonâ fide* supplied, in response to the owner's or contractor's order, give the lien, though they may in the long run be cast aside for something better, or used only for the purpose of experimenting as to the best method of supplying what is needed for the building, etc. Less than this would be, it seems to me, unfair to the man who furnishes the supplies. He is not responsible or to suffer loss because the plan or the execution of the work or the placing of the supplies have fallen short of what was expected. If the experiment made by the use and employment of the bolts in question had been completely successful, so as to demonstrate the best way of supplying the necessary protection to the elevator, and so to point the best way to the more permanent construction, the result would be decided gain to the owner and contractor. If they failed to give this result,

and were ultimately taken out of the building and rejected, that loss should not fall on the material-man. These bolts were purchased and employed upon and in the attempt to better this very building, and that is sufficient consideration to give the man who supplied them a lien. The essential consideration is, were the supplies furnished to be used in the building? And the length of user therein is not material. They were affixed to the building, and they appear afterwards to have been detached from the building, but with the ultimate destination of them the material-man has no concern. The point is a new one, but the remedial language of the statute is enough to include this claim.

On the other point the case of *Edmonds v. Tiernan*, 21 S.C.R. 406, does not apply to the present lien law. Section 28 provides for the taking of a promissory note (as collateral, not in payment), and it shall not affect the lien, unless an express agreement in writing to that effect is made. That is the point of distinction. In the above case it was held as a starting point that there was only a potential right of lien, and that taking the note was a waiver of the lien; and consequently negotiating the note was an extinction of the lien. Now, there is a statutory lien given by supplying the material, and the note may be taken and held and used for raising a temporary supply of money and taken up again by the lien-holder after dishonour, ready for delivery upon enforcing the lien. The only object now to be observed is that the person liable (debtor) shall not be compelled to pay both the note and the lien. By such a dealing the lien is neither satisfied nor superseded, although the active prosecution of the lien may be suspended while the note is current and out of the lien-holder's hands.

A mechanic's lien should stand at least as high as a vendor's lien on goods sold. It was held in *Bunney v. Poyntz* (1833), 4 B. & Ad. 568, 573, that taking a promissory note of the vendor for the goods, and negotiating it with bankers, who held it at the time of action, was substantially a payment and ended the right of retainer of the vendor. The matter is however further considered in *Gunn v. Bolckow* (1875), L.R. 10 Ch. 491, and the effect of that decision was lately commented on by Warrington, J., in *In re J. Defries & Sons Limited*, [1909] 2 Ch. 423, 429, and

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he says what was pointed out by Mellish, L.J., was that the negotiation by a creditor of a cheque given for a debt may make it incumbent on him, if he insists on his security, to indemnify the debtor against the cheque being presented for payment; but that, he says, is a very different thing from saying that the negotiation of the cheque has destroyed the security.

My brother Latchford has set forth the facts, and I agree with his conclusions both of fact and law.

MAGEE, J., dissented in part, holding that *Edmonds v. Tiernan* applied to the present Act.

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DOMINION EXPRESS CO. v. MAUGHAN.

Partnership—Holding out—Estoppel—Representation of Authority—Publicity.

A father and son were ostensible partners; the father held out the son as doing insurance business with him as a principal, under the name of M. & Son; the son, by signature and conduct, represented to the plaintiffs that he was authorised to use the father's name, and obtained an agency from the plaintiffs for the issue and sale of money orders in the name of M. & Son, the plaintiffs believing that the father and son were partners. Publicity as to the firm M. & Son was given by advertisement, letter-heads, office sign, etc.:—

Held, that, to fix the father with the consequences of his son's acts in the name of the firm, it was not essential that the father should have himself made any representation to the plaintiffs; it was enough that the father had held out his son as his partner under such circumstances of publicity as to satisfy a jury that the plaintiffs knew of it and believed the son to be a partner of the father; and upon the evidence the father was liable to the plaintiffs for money orders issued by the son.

Judgment of RIDDELL, J., reversed.

APPEAL by the plaintiffs from the judgment of RIDDELL, J., dismissing the action as against the defendant John Maughan.

The plaintiffs sued for \$1,395.13, being the amount of certain money orders alleged to have been drawn by John Maughan & Son, as agents for the plaintiffs, and for indemnity in respect of another order not accounted for. The defendant John Maughan denied any agency either by him or his firm for the plaintiffs, and asserted that the agency, if any, was the defendant Harry Maughan's individually, and also denied that Harry Maughan

was a member of the firm of John Maughan & Son, and denied that Harry Maughan had any right to sign the name of John Maughan & Son.

The facts are stated in the judgment.

November 8, 1909. The appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ.

Shirley Denison, for the plaintiffs. The evidence shews that there was a partnership between John and Harry Maughan, and, even if it should be held that there was no partnership, there was a sufficient holding out by John Maughan of Harry Maughan as his partner to make the former liable by estoppel. I refer to Lindley on Partnership, 7th ed., p. 103, as to the facts which will be sufficient to establish such a holding out as is contended for by the plaintiffs, from which it appears that it is a question of the intention of the parties: *Cox v. Hickman* (1860), 8 H.L.C. 268, at pp. 293, 301. Here the evidence discloses a joint effort on the part of John and Harry Maughan and a part sharing in the profits by the latter, which is evidence of intention. The evidence also shews that the father held out the son as doing business with him as a partner, and a foundation is thus laid for the evidence by which it may be shewn that the plaintiffs relied and acted upon the son's representations. I refer to *Young v. Axtell* (1783), which is cited in the course of the argument in *Waugh v. Carter* (1793), 2 H. Bl. 235, at p. 242; also to *Dickinson v. Valpy* (1829), 10 B. & C. 128, at pp. 140, 141. In the case of *Martyn v. Gray* (1863), 14 C.B.N.S. 824, the plaintiff did not hear the statement of the defendant upon which it was held that he was entitled to rely, but it was made in the presence of another person, who afterwards repeated it, and the defendant was held liable. I refer also to *Fletcher v. Pullen* (1889), 16 Atl. Repr. 887, where it was held that a foundation was laid, although the plaintiff did not rely on advertisements. Reference was also made to *Nicholls v. Dowding* (1815), 1 Stark. 81; *Sangster v. Mazarredo* (1816), 1 Stark. 161; *Ontario Silver and Antimony Co. v. Andrew* (1905), 5 O.W.R. 206, affirmed 6 O.W.R. 63; *Town of Oakville v. Andrew* (1905), 6 O.W.R. 454, per Moss, C.J.O., at p. 457; *Codville George-son Co. v. Smart* (1907), 15 O.L.R. 357; *Hasleham v. Young* (1844), 5 Q.B. 833; *Duncan v. Lowndes* (1813), 3 Camp. 478; *Brettel v.*

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W. J. Boland, for the defendant John Maughan. The judgment of the trial Judge is supported by the evidence and should be affirmed. There is no evidence that Harry Maughan was introduced to the plaintiffs as a member of the firm of John Maughan & Son; he was merely a clerk in the insurance business of that firm. Even if it should be considered that there was a holding out of Harry Maughan as being a partner in any sense, such holding out referred altogether to a different kind of business from that in which the firm was engaged.

January 17. BOYD, C.:—Apart from the question of actual partnership between John Maughan and his son, which need not be now resolved, it is unquestionable that John Maughan and his son gave themselves out to the public as doing insurance business in company, and so became liable as partners to those who dealt with them on that footing. To fix John Maughan with the consequences of his son's acts in the name of the firm "John Maughan & Son," it does not seem to be essential that John Maughan should have himself made any representation to the plaintiffs; it is enough if the person sought to be charged has held out the one who acts as his partner under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be an agent or partner of the other: *Dickinson v. Valpy*, 10 B. & C. 128, 140. The evidence here seems sufficient to connect the father with the son. The son appears and is introduced to the plaintiffs as a member of the firm of J. Maughan & Son, and asks for a supply of money orders for the firm, and is supplied accordingly. True, no further inquiries were made, but the plaintiffs' manager of that department believed what was thus represented concerning the son by another officer of the plaintiffs (Mr. Sutherland, the customs clerk in the office of the plaintiffs). The son himself admitted his position to be as described, for he signed the agreement of the 25th October, 1907, appointing "J. Maughan & Son as agents" for the issue and sale of money orders in the name of the firm. That was a distinct representation by the son that he and his father were doing business together, upon which the plaintiffs acted, believing it to be true. It is well found

and accepted as fact by the Judge at the trial that these money orders are of common use with all kinds of firms and partnerships in every kind of business through the country for the purpose of remitting money, instead of using bank cheques. The evidence is that this same firm of Maughan & Son had a similar agency for money orders with the Canadian Express Co. from 1906 to October, 1907. The publicity as to the firm Maughan & Son was given by advertisement in the Canadian Directory; printed headings of letter paper used by the firm; sign on the office window; bill heads and receipts for insurance: these all in the same year as that in which dealings were had with the plaintiffs. The clerk who introduced the son had good reason, therefore, to believe he was of the firm of Maughan & Son; the son admitted that he was of the firm, and signed in the same way, and his order was thus accepted by the plaintiffs. The son was doing business with the father under the firm name, and could truthfully so represent to the plaintiffs. The father permitted the son so to act that he could in good faith so represent. The evidence thus supplied of the acts and representations of the son are admissible as against the father in the same way and to the same extent as if the plaintiffs had sought information in the directory or had gone to inspect the business sign on the office.

Where one knowingly permits his name to be used as one of the partners in a trading firm under such circumstances of publicity as to satisfy a jury that a stranger knew it and believed him to be a partner, he is liable to such stranger in all transactions in which the latter engaged, and gave credit upon the faith of his being such partner: *Greenleaf*, sec. 207, citing *Dickinson v. Valpy*, 10 B. & C. 128. In *Fox v. Clifton* (1830), 6 Bing. 776, at p. 794, Tindal, C.J., says: "Where a person allows his name to remain in a firm, either exposed to the public over a shop-door, or to be used in printed invoices or bills of parcels, or to be published in advertisements, the knowledge of the party that his name is used, and his assent thereto, is the very ground upon which he is estopped from disputing his liability as a partner." Many of these tokens are found to exist in the present case.

See also *Rogers v. Murray* (1888), 110 N.Y. 658, 18 N.E.R. 261, a case not unlike the present, in which it is pointed out that a partnership may be established as well by circumstances, declarations, and conduct, as by direct proof.

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According to the evidence, this dealing with money orders as cheques is not foreign to the insurance business, part of it being, as stated in the defence, remitting moneys received for premiums to the head offices of the companies and the underwriters: paragraph 4 of defence. The use of such orders as cheques for payment in all kinds of business is not disputed.

Briefly, the father and son were ostensible partners; the father held out the son as doing insurance business with him as a principal; upon this foundation the son represents by conduct and signature that he is authorised to use the father's name; that is believed and acted on by the plaintiffs. Having given evidence of a partnership even by holding out, a foundation is laid for the admissibility of the son's representation against the father as competent evidence: *Nicholls v. Dowding*, 1 Stark. 81; *S.C.*, 18 R.R. 796. The case appears to be within the rule that if a person is by his own permission held out as a partner, that is enough to involve him when acted upon: *Pott v. Eytton* (1846), 3 C.B. 32, 38.

This aspect of the case does not appear to have been presented to the mind of the learned Judge; but, having regard to this line of evidence and the facts of the case, I think judgment should be entered for the plaintiffs against both defendants with costs.

MAGEE and LATCHFORD, JJ., concurred.

[IN THE COURT OF APPEAL.]

RE BRUCE MINES LIMITED AND TOWN OF BRUCE MINES.

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Jan. 17.

Assessment and Taxes—Assessable Property—Buildings on Mineral Lands—Use for Mining Purposes—Assessment Act, sec. 36 (3)—Appeal from Order of Ontario Railway and Municipal Board—Question of Law—Amount of Assessment—Question of Fact.

Held, affirming an order of the Ontario Railway and Municipal Board, that certain buildings on mineral lands, buildings used for mining purposes, were assessable under the Ontario Assessment Act, 4 Edw. VII. ch. 23.

Per GARROW, J.A.:—The meaning of sub-sec. 3 of sec. 36 of the Assessment Act is that all buildings which add to the value of the land for any purpose, and not merely buildings which add to its agricultural value, are to be assessed. That is the sole statutory test applicable to all lands and to all buildings thereon. The construction placed upon sec. 36 by BOYD, C., in *Canadian Oil Fields Co. v. Village of Oil Springs* (1907), 13 O.L.R. 405, is preferable to that placed upon it by a Divisional Court in the same case. The question whether the buildings were assessable was one of law and a proper subject of appeal to the Court of Appeal under sec. 51 of the Ontario Railway and Municipal Board Act, 1906; with the amount of the assessment the Court of Appeal had nothing to do, that being a question of fact.

APPEAL by the Bruce Mines Limited from an order of the Ontario Railway and Municipal Board varying a decision of the Court of Revision for the Town of Bruce Mines.

The facts of the case appear in the reasons for the order of the Board as given by the Chairman:—

This is an application by way of appeal from the Court of Revision for the Town of Bruce Mines dismissing an appeal from the company's assessment. The company's chief cause for complaint is, that the lands, which are mineral lands, were not assessed in accordance with sub-sec. 3 of sec. 36 of the Assessment Act.

There is no doubt, speaking generally, that the company's lands are mineral lands, and that they should be valued and estimated at the value of other lands in the neighbourhood for agricultural purposes. The company, however, produced a plan from which it appears that a portion of the property has been subdivided into building lots; and treated by the company as ordinary town property. Some of the lots have been put on the market and sold for building purposes, and others are held and have been offered for sale for a like purpose. These lots are not mineral lands, and from the evidence it is clear that they were assessed at a very reasonable figure. The following is the list of the lots that the assessor was right in not classing as mineral lands, and the amounts at which they were

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assessed (describing the lots and giving the amounts, which totalled \$3,305).

Lot No. 131 . . . was assessed for the sum of \$200. This the Board confirms. The water lot comprising 56 acres . . . was assessed for \$1,680. The Board reduces this assessment to \$4.50 per acre, and fixes the assessment at \$252.

The following property is mineral lands and buildings, and should be assessed at \$31,243 (describing the property). . . .

The Board is of the opinion that the Act 6 Edw. VII. ch. 65 (O.), "An Act respecting the Town of Bruce Mines and the Copper Mining and Smelting Company of Ontario, Limited," is binding on all parties; that the Act validated by-law No. 127 of the Corporation of Bruce Mines, which provided that for all purposes of assessment, both for municipal and school taxes, the sum of \$35,000 should be fixed as the maximum amount on which the company's assessable property shall be assessed by the corporation for payment of municipal and school taxes, rates, or other assessments. The evidence shewed a wide divergence of opinion as to the value of other land in the neighbourhood for agricultural purposes; and we think that the justice of the case will be met by reducing the assessor's valuation on the lastly mentioned property, which is unquestionably mineral lands and buildings thereon, to \$31,243, which, with the other amounts above mentioned, will make the company's assessment \$35,000, the maximum fixed by 6 Edw. VII. ch. 65.

September 23, 1909. Leave to appeal was granted by the Court of Appeal.

November 22, 1909. The appeal was heard by Moss, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

J. A. McPhail, for the appellants. The assessment is too high. The lands, being mineral lands, have not been assessed in accordance with the provisions of the Assessment Act, 4 Edw. VII. ch. 23, sec. 36, sub-sec. 3 (O.), in that they have not been valued and estimated at the value of other lands in the neighbourhood for agricultural purposes. The value of the machinery situate on the lands has been calculated in the assessment, which should not be done. Such buildings as are used for mining purposes should be withdrawn

from the assessment: *Canadian Oil Fields Co. v. Village of Oil Springs* (1907), 13 O.L.R. 405.

G. H. Watson, K.C., and N. H. Peterson, for the respondents. The land has been assessed as land for agricultural purposes, and the buildings on the land according to their value for agricultural purposes, which is proper, as the term "land" includes buildings, according to the Assessment Act, sec. 2, sub-sec. 7 (d). "In the neighbourhood" means in the municipality. The machinery and plant have not been assessed as such. They have been brought in as buildings for agricultural purposes. In *Canadian Oil Fields Co. v. Village of Oil Springs*, the learned Chancellor expressed the opinion that plant and machinery are a part of buildings, and can be used to increase the value of buildings. This Court cannot reduce single or separate items of assessment. Appeals from the Ontario Railway and Municipal Board to this Court are on questions of jurisdiction and of law: Ontario Railway and Municipal Board Act, 1906, sec. 43, sub-secs. 2 and 4, and sec. 51. The Board made no mistake in law, nor did they exceed their jurisdiction.

January 17. GARROW, J.A.:—Appeal by the Bruce Mines Limited, a mining company carrying on business at the town of Bruce Mines, against the order of the Ontario Railway and Municipal Board, made on an appeal to the Board from the local Court of Revision, in an assessment matter.

The original assessment of \$37,650 was reduced by the Board to \$31,243, and this sum should be still further reduced if, as the appellants contend, certain buildings upon the lands (which are what is called in the Assessment Act "mineral lands") used for mining purposes should not have been assessed, the Board having held otherwise. The question thus presented is one of law, depending upon the proper construction of the Assessment Act, 4 Edw. VII. ch. 23, and therefore a proper subject of appeal to this Court under sec. 51 of the Ontario Railway and Municipal Board Act, 1906.

The appellants' contention that such buildings are not the proper subject of assessment is supported by the judgment of a Divisional Court, reversing that of the Chancellor, in *Canadian Oil Fields Co. v. Village of Oil Springs*, 13 O.L.R. 405, but, having regard to all the circumstances, I incline to agree with the construction placed upon sec. 36 by the learned Chancellor rather than with that arrived at

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by the Divisional Court. Nothing in that case turns, I think, upon the fact that the property there in question is called "plant" rather than "buildings," for the "plant" was, as pointed out by the Chancellor, within the definition of "land" in the Assessment Act: see sec. 2, sub-sec. 7. And the contention with which he was there dealing, as stated by him, at the foot of p. 405, is exactly the contention made before us by counsel for the appellants. Mulock, C.J., with whom Teetzel, J., concurred, was apparently of the opinion that only buildings which added to the value of the mineral lands for agricultural purposes should be assessed. Anglin, J., also concurring, thus expressed his view of the alleged exemption (p. 411): "But, because the statute prescribes an exclusive standard of valuation which can have no possible application to such plant, its owners necessarily receive the benefit of an exemption which it may not have been the intention of the Legislature to confer."

It is, I think, the plain intention of the Assessment Act as a whole that all land and all buildings upon land not expressly declared to be exempt shall be assessed. The assessor's duty in making the assessment is prescribed in sec. 22 *et seq.* Among other things, he is to set down in separate columns: (1) the number of the lot; (2) the number of acres; (3) the actual value of the parcel exclusive of buildings; (4) the value of the buildings; and (5) the total actual value of the parcel. Then sec. 36, the section chiefly in question, makes provision for the nature of the valuation to be placed upon lands and buildings. Sub-section 1 provides that, except in the case of mineral lands, real property (which includes buildings) shall be assessed at its actual value. Sub-section 2 provides that in assessing land having buildings thereon, the value of the land and buildings shall be ascertained and stated separately, and the assessment shall be the sum of such values; and the value of the buildings shall be the amount by which the value of the land is thereby increased. Sub-section 3 provides that in estimating the value of mineral lands, such lands and the buildings thereon shall be valued and estimated at the value of other lands in the neighbourhood for agricultural purposes, but the income derived from any mine or mineral work shall be subject to taxation in the same manner as other incomes under the Act. Sub-section 3 has been in the statutes unchanged for about 40 years, but sub-sec. 2 was only introduced in the year 1904, as were also the provisions for separate

columns and valuations for land and buildings. And both of these new provisions, in my opinion, apply to all lands, including mineral lands, notwithstanding the continued and apparently unnecessary presence in sub-sec. 3 of the words "and the buildings thereon." The new provisions certainly apply to agricultural lands, the buildings upon which must be separately valued as the Act directs. And this would include buildings upon agricultural lands not useful only for agricultural purposes. For instance, if a farmer had built upon his farm a mill, or a summer hotel, such buildings, if adding to the value of the land, would not escape assessment because the lands were agricultural lands. And I am quite at a loss to see any reasonable ground for a different construction in the case of mineral lands.

There is nothing in the Act to indicate that such lands were intended to be specially favoured. There is, indeed, at least as much ground for the view that the statutory comparison of such lands with neighbouring agricultural lands was intended to prevent them from being assessed too low as for the opposite opinion. Their surface value is often, and perhaps usually, much less than that of neighbouring agricultural lands. Their real value lies underneath, and is incapable of ascertainment until developed; and indeed may not exist at all, for not all mineral lands result even after the expenditure of much capital in profitable mining upon them. And yet, however valueless the surface, it must continue to be assessed at the rate of neighbouring agricultural land, however valuable. And when the unknown mineral value, if it exists, has been ascertained by mining operations, the old assessment remains and a new one is added in the shape of an income tax, a sort of taxation not applicable to agricultural lands.

Sub-section 3, even as it stands, expressly says the land and the buildings are to be assessed. This must mean all buildings which add to the value of the land for any purpose, and not merely buildings which add to its agricultural value. That is the sole statutory test, applicable, in my opinion, to all lands and to all buildings thereon.

For these reasons, I agree with the Board that the buildings in question were properly assessable. With the amount we have nothing to do, that being a pure question of fact.

The appeal should be dismissed with costs.

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MEREDITH, J.A.:—An impression, however strong, that the Board has not well performed its duties, is no sort of excuse for an ill-performance by this Court of its duties. Our powers are strictly limited to questions of law, and heed should be taken that we do not, in undue anxiety to set the Board right in a matter within its exclusive jurisdiction, stray into the domain of questions of fact, where we should be but usurpers and intermeddlers.

That the Board made no mistake as to the law bearing upon the questions of fact involved in this case no one denies. The appellants certainly have no ground for complaint in that respect, for over and over again the Chairman enunciated it in the very terms they now contend for. A perusal of the report of the argument, before the Board, shews their acceptance of the legal basis of assessment just as contended for by counsel for the appellants: that appears throughout the argument; and, at its conclusion, the Board and such counsel were quite at one in regard to the proper mode of dealing with the buildings. Again this reappears throughout the reasons given for their findings: so that throughout the whole case the appellants are unable to point to a single instance of mistake in law, by the Board, to which they can take any exception.

The agreement fixing the maximum amount of assessment was something which the Board could, and were bound to, take into consideration: whether it weighed too much or too little, or had any weight at all, except in its legal aspect of a maximum limit, in coming to their conclusion on any question of fact, as a fact, is none of our business. It is manifest that they did not deem it in any sense binding upon them, except as a maximum limit—that they quite appreciated the fact that the amount stated in the agreement was merely one beyond which the appellants could in no case be assessed.

To assume that, knowing the law, the Board wrongly misapplied it, would, to my mind, be doubly unwarranted and inexcusable: (1) because it would be beyond our jurisdiction, it would be invading a field of action in which the Legislature considered the Board more competent than the Courts; and interference with which, by the Courts, it has very plainly inhibited for that reason; and (2) because there would be nothing in fact to warrant it; it would doubtless emanate only from our ignorance of the facts, with which the Board, who heard the case on the spot, were no doubt entirely familiar.

The Chairman of the Board took the trouble to state the facts. and the method by which their assessment was in fact reached, for

the information and benefit of this Court; but it was considered that that could not be done regularly as a statement of the case in appeal, which was the form in which it was presented, and so it was stricken out of the appeal book; but, as the Board has a right to be heard upon this appeal, and as it might and ought to be applied to for information material to any question properly before this Court, when the Court is in need of such information, I can find no excuse for shutting my eyes to the facts set out in the irregular "statement of case" * or permitting my mind to remain in ignorant

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* The "statement of case" was as follows:—

The members of the Ontario Railway and Municipal Board, at the time of the appeal before them, made a personal inspection of all the property in the town of Bruce Mines owned by the above named appellants, and certain facts hereinafter mentioned were stated and admitted before the Board. The decision of the Board as appearing in its written judgment was arrived at from the said personal inspection, the facts so stated and admitted, and the evidence appearing in the notes of evidence.

The original patent from the Crown to the Huron Copper Bay Company, predecessors of the above named appellants, comprised 6,481½ acres, of which original acreage there is at present in the town of Bruce Mines 826.7 acres.

The appellants and their predecessors have, at various times since the patent, sold and conveyed the surface rights in 500 acres of the 826.7 acres above referred to, and the appellants are still the owners of 300 acres, more or less, the balance of the said acreage.

The appellants and their predecessors, in selling and disposing of the 500 acres, more or less, have always reserved the mineral rights in the properties so sold, and the appellants are now the owners of the mineral and mining rights in the whole area of 826.7 acres, and are, in addition, the owners of the surface rights of the said 300 acres, more or less, which have not been sold or disposed of.

A distinction has always been made in the town of Bruce Mines between the owners of the surface rights and the owners of the mineral rights, and no assessment has ever been made as against the mineral rights in the town, and it appeared before the Board that the assessor of the town of Bruce Mines is not assessing and has not assessed the mineral rights as owned by the appellants and comprised in the area of the town.

It is in respect to the 300 acres, more or less, of surface rights in the town that the assessment has been made as against the appellants.

On the surface rights owned by the appellants in the town are situate a number of buildings, such as a large boarding house, a barn, two residential properties, a mill, shaft houses, machine shops, railway track, electric light plant, and two wharfs or docks, besides other buildings.

It appeared before the Board that no attempt has been made by the assessor of the town of Bruce Mines to assess any of the machinery or mining plant comprised in any of the said buildings, but the assessor for the town, for convenience sake and for the purpose of designating or identifying the property, assessed by the names by which said buildings usually are known in the town, has termed them stamp mill, machine shops, etc., and has assessed the buildings as agricultural buildings, with their values as such, and there has been no assessment whatever in regard to the mining machinery or of the mining rights held by the appellants within the town of Bruce Mines.

All the above facts were stated on the hearing before the Ontario Railway and Municipal Board, and were admitted to exist, and upon such facts and personal inspection and examination of the properties and upon the evidence adduced, the sum mentioned in the judgment of the Railway and Municipal Board, namely, \$31,243, was fixed by the Board as the total sum representing the assessable value of the properties other than the specific lots referred to in the judgment.

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condemnation of the Board in any matter whether within or without the jurisdiction of this Court.

I would dismiss the appeal.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., agreed in dismissing the appeal.

[IN THE COURT OF APPEAL.]

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Jan. 17.

RE CONIAGAS MINES LIMITED AND TOWN OF COBALT.

Assessment and Taxes—Properties Assessed at over \$20,000—Reduction by Court of Revision to less than \$20,000—Right of Appeal to Ontario Railway and Municipal Board—Assessment Act, sec. 76—Ontario Railway and Municipal Board Act, 1906, sec. 51—Buildings on Mineral Lands—Assessable Property—Value—Question of Fact—Leave to Appeal to Court of Appeal.

Properties consisting of a number of lots laid out upon the town-site of Cobalt, being part of a mining location, some of the lots being vacant and some having dwelling-houses and other erections thereon, were assessed against a mining company, who had acquired both the mineral and surface rights in the lots, at \$21,475. Upon appeal the Court of Revision reduced the amount to \$17,700. The company, not being satisfied, appealed to the Ontario Railway and Municipal Board. Their appeal was dismissed, and they then applied to the Court of Appeal for leave to appeal to that Court:—*Held*, that leave should be refused.

Per Moss, C.J.O.:—To entitle a person to appeal to the Railway and Municipal Board under the combined effect of sec. 51 of the Ontario Railway and Municipal Board Act, 1906, and sec. 76 of the Assessment Act, it is not necessary that the amount of the assessment fixed by the Court of Revision on one or more of such person's properties should aggregate \$20,000; the amount of the assessment made by the assessor is the determining factor. Buildings upon the lands, whether to be treated as "mineral lands" or otherwise, are subject to be valued and assessed against the owners, and the question of the value is a question of fact, as to which no appeal lies to the Court of Appeal under sec. 51 of the Ontario Railway and Municipal Board Act, 1906, or otherwise.

Per MEREDITH, J.A.:—The question before the Board was one of fact, not one of law; and no appeal lay.

THE following statement is taken from the judgment of Moss, C.J.O.:—

The Coniagas Mines Limited moved before this Court for leave to appeal from a decision of the Railway and Municipal Board, pronounced upon an appeal to it from the Court of Revision of the Town of Cobalt, in respect of the assessment of certain properties belonging to the applicants. The properties consist of a number of lots laid out upon the town-site of Cobalt, some being

vacant and some having dwelling-houses and other erections thereon. They are laid out on part of mining location J. B. 6. The applicants acquired the title of the original grantees by patent of the mines, minerals, and mining rights in this location, the surface rights in the lots in question being, at the time of the applicants' acquisition, vested in various purchasers thereof. Subsequently the applicants acquired the title of the purchasers.

The situation is concisely stated by the learned Chairman of the Railway and Municipal Board: "The company first bought the mineral rights, and afterwards acquired the surface rights. There are about twenty houses on these lots. They are rented to workmen in the mine."

The properties were assessed by the assessor at \$21,475. Upon appeal the Court of Revision reduced the amount to \$17,700. The applicants, not being satisfied, appealed to the Railway and Municipal Board, as provided by sec. 51 of the Ontario Railway and Municipal Board Act, 1906, and the appeal was dismissed.

November 15, 1909. The application for leave to appeal was heard by Moss, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A.

H. H. Collier, K.C., for the applicants. The lands have been assessed as town lots, although they were purchased for mining purposes, and the company are actually mining on a portion of the property, and there are buildings on only three lots. Leave should be granted to appeal from the decision of the Ontario Railway and Municipal Board, as there is an important question involved as to the basis of valuation which should be adopted in the assessment of properties of this kind.

W. J. Clark, for the Corporation of the Town of Cobalt. It is submitted that the Railway and Municipal Board had no jurisdiction to entertain the appeal from the ruling of the Court of Revision, as the valuation had been reduced by that Court to a sum below \$20,000, which is the smallest amount which will entitle the Board to entertain the appeal, having in view the combined effect of sec. 51 of the Ontario Railway and Municipal Board Act, 1906, and sec. 76 of the Assessment Act. This objection to jurisdiction was taken before the Board, which erred in holding that such jurisdiction existed. As regards the merits, there is

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no evidence that these lots are being used in connection with the mine, or that they are necessary for mining purposes.

Collier, in reply, argued that the Board had jurisdiction to hear the appeal, as it was the valuation of the assessor that fixed the amount with regard to which this question must be decided. On the merits he referred to *Canadian Oil Fields Co. v. Village of Oil Springs* (1907), 13 O.L.R. 405, *per* Anglin, J., at p. 411.

January 17. Moss, C.J.O. (after stating the facts as above):—
On behalf of the Town of Cobalt objection was taken before the Board, and again upon the application to this Court, that the appeal was not competent, on the ground that to entitle a person to appeal to the Railway and Municipal Board, under the combined effect of sec. 51 of the Ontario Railway and Municipal Board Act, 1906, and sec. 76 of the Assessment Act,* the amount of the assessment fixed by the Court of Revision on one or more of such person's properties must aggregate \$20,000.

I am of opinion that the Board, in holding that the amount of the assessment made by the assessor is the determining factor, took the correct view. Looking at the various provisions of the Assessment Act dealing with appeals, it seems apparent that even upon the final appeal, whether to a County Judge under sec. 68 *et seq.*, or to the Board under sec. 76, as affected by sec. 51 of the Ontario Railway and Municipal Board Act, 1906, the whole question is open, and that it is competent to the tribunal, not merely to reduce the amount fixed by the Court of Revision, but to

* By sec. 76 (1) of the Assessment Act, 4 Edw. VII. ch. 23 (O.), "Where there is an appeal from any Court of Revision under section 68 of this Act to the Judge of the County Court of the county in which the assessment is made and a person desiring to appeal has been assessed on one or more properties to an amount aggregating \$20,000, such person . . . shall have the right to have the appeal from the said Court of Revision heard by a Board consisting of the Judges of the counties which constitute the County Court district. . . ." Section 51 of the Railway and Municipal Board Act, 1906, is as follows: "(1) The appeal provided for by section 76 of the Assessment Act shall be to the Board"—*i.e.*, the Ontario Railway and Municipal Board—"instead of to the Board of County Judges as therein provided. (2) The Board shall have power upon such appeal to decide not only as to the amount at which the property in question shall be assessed, but also all questions as to whether any persons or things are liable to assessment or exempt from assessment under the provisions of the Assessment Act. (3) An appeal shall lie from the decision of this Board under this section to the Court of Appeal upon all questions of law, but such appeal shall not lie unless leave to appeal is given by the said Court upon application of any party and upon hearing the parties and the Board. . . ."

restore or perhaps increase the amount fixed by the assessor: see secs. 65 (especially sub-secs. 16, 19, 21, and 22), 66, 68, 69, 70, 75, and 76 of the Assessment Act, and sec. 51 (2) of the Ontario Railway and Municipal Board Act, 1906.

The right of a person whose properties, notwithstanding an appeal to the Court of Revision, remain assessed at an aggregate of \$20,000, to avail himself of the provisions of sec. 76, and so obtain a different tribunal to that open to him under sec. 68, is undoubted. But is there any good reason why, where from the original action of the assessor the properties are still exposed to the possibility of the final assessment amounting to or even exceeding \$20,000, the person so assessed should not have the same right? Suppose that in this case the town had appealed from the decision of the Court of Revision under sec. 68, with a view to restoring the amount fixed by the assessor, ought the applicants to be deprived of the opportunity of obtaining the judgment of the Board instead of that of the County Judge as to whether \$21,475 or \$17,700 was the proper amount?

I think the words of sec. 76, "a person desiring to appeal has been assessed . . .," are capable of and should receive this construction.

It is possible that, as was argued, this view will give rise to some anomalies, but anomalies are likely to arise whichever view be taken, and the view of the Board seems to me to be freer than the opposite from that danger.

As regards the merits of the application, the conclusions to which we have come in the case of *Re Bruce Mines Limited and Town of Bruce Mines*, ante 315, govern this case.

Buildings upon the lands in question, whether they are to be treated as "mineral lands" or otherwise, are subject to be valued and assessed against the owners, and the question of the value is simply a question of fact, as to which no appeal lies to this Court under sec. 51 of the Ontario Railway and Municipal Board Act, 1906, or otherwise.

The application must, therefore, be refused.

MEREDITH, J.A.:—In respect of some of the lands in question, they were town lots of which the applicants had been owners of the mining rights, other persons having been the owners of the

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freehold in all other respects, and who had been taxed in respect of such ownership, but who had sold all their respective rights in such lots to the applicants, who are now in all respects the owners of them. Mining rights in other town lots had been acquired, and are now owned, by the applicants, having been so acquired in a block of land which included them.

Since acquiring such additional rights in such town lots, some of the lots have been let by the applicants to some of their workmen to reside upon, and no new mining operations have been commenced upon any of them.

The Board found, as a fact, that such town lots, so acquired, were held, and used, by the applicants for other than mining purposes, and, therefore, that they were properly assessed in the same manner as they had been assessed against the owners whose rights the applicants had so acquired.

There was evidence, in these circumstances alone, upon which a jury might find that the lots in question were held for other than mining purposes. They already had all the mineral rights in them, and were acquiring other rights, not assessable as mining property because the owners had no mining rights in them, but only rights from which all mining rights had been abstracted—simply town lots subject to mining rights. So, *prima facie*, the property so acquired was assessable, as it has been assessed, and the applicants were at least bound to shew that they were being used and held by them as mining lands only. Therefore the question before the Board was one of fact, not one of law; and no appeal lies to this Court except upon questions of law.

I would, therefore, refuse this application; without expressing any opinion upon the question of right to appeal to the Board.

OSLER, GARROW, and MACLAREN, JJ.A., agreed in refusing the application.

[DIVISIONAL COURT.]

D. C.

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Jan. 19.

GORDON V. GOODWIN.

Landlord and Tenant—Lease of Furnished House—Unsanitary Condition—Right of Tenant to Repudiate Tenancy—Remedying Defects—Findings of Fact Made by Trial Judge—Reversal on Appeal.

Upon the letting of a furnished house, there is an implied undertaking that the house is reasonably fit for habitation; and if from any cause this is not the case, the tenant is justified in repudiating the tenancy. This is quite irrespective of any representation by the lessor; if the lessor makes a representation that the house is fit for habitation, he is not relieved from the effect of that representation by the fact that he honestly believed in the truth of it. The house must be so reasonably fit for habitation at the time of the beginning of the term; and the lessor has no right to be allowed after that time to put the house in the condition it should have been in.

Wilson v. Finch-Hatton (1877), 2 Ex. D. 336, and *Charsley v. Jones* (1889), 53 J.P. 280, followed.

A Divisional Court disagreed with the findings of fact of CLUTE, J., at the trial, as to the condition of a house let furnished by the plaintiff to the defendant, and, being of opinion that the house when let was in such an unsanitary condition as to justify the defendant in leaving it, allowed an appeal from the judgment at the trial in favour of the plaintiff, and dismissed an action for damages for breach of the covenants in the lease.

In shewing the unsanitary condition of a house, it is not necessary to prove that the condition was such that it caused illness.

Beal v. Michigan Central R.R. Co. (1909), 19 O.L.R. 502, and *Ryan v. McIntosh* (1909), ante 31, referred to as to the principles to be adopted upon an appeal from the findings of fact made by a trial Judge.

The following statement is taken from the judgment of RIDDELL, J.:—

The plaintiff is the owner of a house in Ottawa, which, by an indenture of lease dated the 1st February, 1909, she let furnished to the defendant for six months, at a rental of \$125 per month in advance. The lessee covenants to leave the premises in good repair; the lessor that the premises and property are "now in good and substantial repair."

The defendant had seen the house advertised, and called on the plaintiff, and was asked to return in a couple of days; he did so, and went and looked over the house; thought it would suit, and returned to the plaintiff. He asked her, before going any further: "What about the sewerage and plumbing in the house? Is it in good condition?" The plaintiff said, "Everything is in perfect order." No doubt, the plaintiff was quite honest in this answer. The defendant took possession of the house, paying the

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first month's rent in advance; about two weeks thereafter he got sick; his wife and the servant had been complaining of the smell in the house, and, after he got sick, the complaints continuing, he sent for a plumber, Holloway. Holloway put on the "smoke test," found a leak at the back of the closet bowl in the bath-room, another in the attic in the ventilating pipe, and in the basement a strong smell of smoke, coming from the ground. The cabinet basin in the defendant's room would "syphon out," *i.e.*, leave itself without water, while the pantry sink made a gurgling noise. Then a ventilating shaft was within ten feet of one of the windows.

All these defects were, in his opinion, sufficient to make the house unsanitary, and would make a healthy person ill, though he would not say dangerous to life. Sewer gas was coming into the house.

Jacques, the plumbing inspector of the city, was present when Holloway applied the tests; and he says also that the building was not sanitary; he suggested some changes, but, even with these, the house would not be "up to date," and the changes which he suggested would cost about \$25, and it would take, he thinks, to complete the job, fifteen days of eight or more hours per day steady work. With the windows open he would not object to live in the house; but he would if the windows had to be closed.

Such a state of affairs, experienced medical men swear, would be sufficient to cause the condition the defendant was in, of infected sore throat; the experience of one of them is that whenever sewer gas is escaping into a house sore throats are found to develop—such a house is unsanitary, and any one in it would be under the risk of contracting disease. No one will, of course, swear that the sore throat was caused by the sewer gas, but only that it might be so caused.

A witness whose employment took him into the basement of the house tells of a bad smell, especially in the basement, and he got a bad cold, turning to sore throat.

The defendant left the house. The plaintiff sued for \$1,000.

The case came down for trial before Mr. Justice Clute at the Ottawa non-jury sittings in June, 1909, and the learned Judge, finding adversely to the defendant, gave judgment for the plaintiff for \$640 and costs.

The defendant now appeals.

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January 10. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, JJ.

Travers Lewis, K.C., and *J. W. Bain*, K.C., for the defendant. The house in question here was a furnished one. In an agreement to let a furnished house there is an implied condition that the house shall be fit for occupation at the time at which the tenancy is to begin. At the time of the defendant's entry, the house was not in a reasonably habitable state. There was not only great discomfort, but danger to health. Owing to defects in the plumbing, noxious gases escaped into the house, causing illness to some of the inmates. The plaintiff had not the right to correct the defects after the tenancy had commenced, or to call upon the tenant to repair: *Wilson v. Finch-Hatton* (1877), 2 Ex. D. 336; *Smith v. Marrable* (1843), 11 M. & W. 5. We refer also to the Public Health Act, R.S.O. 1897, ch. 248, sec. 122, schedule B, sec. 15, rules 3 and 4. The plaintiff represented that everything was in perfect order at the time of the defendant's entry. This was a condition and a warranty: *Bunn v. Harrison* (1886), 3 Times L.R. 146; *Bannerman v. White* (1861), 10 C.B.N.S. 844. It is not enough that the plaintiff believed the house to be in a fit state for habitation: *Charsley v. Jones* (1889), 53 J.P. 280. The plumbing, not being in accordance with the Ottawa city by-law No. 2262, which states that all plumbing must be such as to prevent gas escaping, could not be used by the tenant without his breaking the law. Therefore, the house was not habitable. See also Woodfall on Landlord and Tenant, 18th ed., p. 201; Clarke on Landlord and Tenant, 1895 ed., pp. 663, 664; Redman & Lyon's Law of Landlord and Tenant, 5th ed., pp. 197, 198.

G. F. Henderson, K.C., for the plaintiff. The defects in this house may have arisen after the tenancy commenced. On the letting of a furnished house there is no implied agreement that the house shall continue fit for habitation during the term: *Sarson v. Roberts*, [1895] 2 Q.B. 395; Foa's Relationship of Landlord and Tenant, 4th ed., p. 148. A little escaping gas does not render a house unfit for habitation. The repairs made by the plaintiff were not made because the house was not habitable: *Malone v. Laskey*, [1907] 2 K.B. 141.

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January 19. RIDDELL, J. (after setting out the facts as above):—There is no doubt as to the law. Upon the letting of a furnished house, there is an implied undertaking that the house is reasonably fit for habitation; and if from any cause this is not the case, the tenant is justified in repudiating the tenancy: *Wilson v. Finch-Hatton*, 2 Ex. D. 336. This is quite irrespective of any representation by the lessor; if the lessor makes a representation that the house is fit for habitation, etc., he is not relieved from the effect of such representation by the fact that he honestly believed in the truth of his representation: *Charsley v. Jones*, 53 J. P. 280. The house must be so reasonably fit for habitation at the time of the beginning of the term; and the lessor has no right to be allowed after that time to put the house in the condition it should have been in. Of course, there is no need for the tenant to answer every whim of a finical tenant; but common sense should be applied in determining whether it does fulfil the required conditions. This state of the law was present to the mind of the learned trial Judge, and the whole question is one of fact.

My brother Clute at the trial found against the defendant, and it becomes now a matter for consideration whether his findings of fact can be supported.

In *Beal v. Michigan Central R.R. Co.* (1909), 19 O.L.R. 502, and *Ryan v. McIntosh* (1909), *ante* 31, we have recently considered the principles to be adopted upon an appeal from the findings of fact made by a trial Judge; and no good end is to be attained by repeating our observations.

Here, it seems to me, my learned brother has failed to give what I consider due weight to the evidence of the condition of the house in general, and confined his attention to three physical defects—two of which he considers slight and trifling and remediable in a short time. The evidence is, to my mind, clear that the house was in an unsanitary condition; it probably, from the evidence, would have been unsanitary even if the two defects found by the learned trial Judge had been remedied; while the third defect, *viz.*, that in the cellar, which seems to be proved by satisfactory evidence, can, I venture to think, not fairly be described as “a very slight defect.” Supposing, however, all the defects to be slight, the case for the plaintiff is not bettered. For, in the first place, it is not the extent of the defect which is material, but the

result of such defect in producing an unsanitary condition; and, second, the plaintiff has not the right either herself to correct these defects now after the beginning of the term or to call upon the defendant himself to repair.

Much was made of the fact that it was not proved that the sickness resulted from the condition of the house. It is quite likely, in accordance with *Beal v. Michigan Central R.R. Co.* and the cases there cited, that the defendant would have failed had he claimed damages from the plaintiff for causing the sickness; but it is not necessary to go that far—it is not necessary to prove that the condition of the house was such that it did cause sickness; it is abundantly sufficient to prove, as was done in this case, that it might have such effect, that is (to repeat) that the house was unsanitary.

I am of opinion that the appeal should be allowed with costs and the action dismissed with costs.

LATCHFORD, J.:—I agree.

FALCONBRIDGE, C.J.:—And I agree in the result.

[DIVISIONAL COURT.]

FINDLAY V. STEVENS.

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Jan. 21.

Building Contract—Penalty for Non-completion of Work by Certain Day—Contractor Delayed by Default of other Workmen—Work not Commenced until after Time for Completion—New Contract—Necessity for Proof of Damage by Delay—Provisions for Extension of Time.

The plaintiff agreed with S. to do the slating, tinning, and tiling work required in the erection and completion of a house on or before the 1st August. The contract contained the following provisions: that the work should be completed by the day named, subject only to such provision for an extension of time as therein provided; that there might be alterations, etc., in the work, and an agreement might be made for an extension of time by reason thereof; that, if the plaintiff could not finish the work by the 1st August, he might be discharged by the architect; that each contractor on the work should be responsible to the other for loss caused by failure to finish work in proper time; that, should the plaintiff fail to finish the work by the 1st August, he should pay by way of liquidated damages \$1 per day thereafter that the works should remain incomplete—due allowance to be made for extension of time for additional work or alterations, and for delay occasioned by the default of contractors for other parts of the work; and that, should any work be delayed upon (*sic*) the time mentioned in the

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agreement by weather or by strikes, the architect should have power to extend the time for the completion.

The carpenter's work was not done on the roof till the 3rd August, and the plaintiff's work, therefore, could not be commenced until after the time fixed for completion:—

Held, that the clause providing a penalty of \$1 a day for delay was applicable to the specific period only, and did not apply to delay after that period had expired. There was in effect a new contract for the performance of the work at the contract price, but the penalty clause was not revived and made applicable to delay in the after-prosecution of the work. For such delay the plaintiff might be liable, but only on proof of damage sustained thereby. Nor were the provisions in the contract for extension of time applicable after the period stipulated for in the contract had expired.

Hamilton v. Moore (1873), 33 U.C.R. 275, 520, and *Holme v. Guppy* (1838), 3 M. & W. 387, followed.

Judgment of the County Court of Wentworth varied.

APPEAL by the plaintiff from the judgment of the County Court of Wentworth.

The action was brought by a contractor against the executors of one Stevens, deceased, to recover a balance alleged to be due under a contract for work done by the plaintiff for the deceased. The material provisions of the contract are set out in the judgment. The defendants, under a clause in the contract, counterclaimed for penalties for delay, alleging that the work was not done within the time specified. Judgment was given for the plaintiff on his claim for \$117 with costs on the proper scale, and for the defendants on their counterclaim for \$227 and County Court costs, the amounts to be set off *pro tanto*.

January 19. The appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ.

H. E. Rose, K.C., for the plaintiff. The appeal is only in respect of the counterclaim, which, it is submitted, the trial Judge should not have allowed, as the penalty clause in the agreement between the parties had no application in such a case as this, in which the plaintiff was unable to complete the work through no fault of his own, but through the default of the owner and his workmen. The cases shew that, in such circumstances, the contract is at an end so far as the penalty clause is concerned: *Hamilton v. Moore* (1873), 33 U.C.R. 520; *Holme v. Guppy* (1838), 3 M. & W. 387. The trial Judge thought that these cases were distinguishable from the present one, inasmuch as the latter contemplates an extension of time, but it is submitted that the principle is the same. The counterclaim does not ask for damages, but is based solely on the penalty clause.

S. F. Washington, K.C., for the defendants. The counterclaim should be amended, if necessary, in order that the defendants may claim damages for the delay in the completion of the work. They are entitled, however, to succeed on the penalty clause, as the cases cited by the plaintiff's counsel are distinguishable. In these cases the architect had no such discretion in permitting extension for valid reasons as existed in the present case, in which, moreover, it is not shewn that the defendants were at fault, and the plaintiff knew that there were other contractors against whom he might have a remedy under a clause in the agreement. He referred to *McDonell v. Canada Southern R.W. Co.* (1873), 33 U.C.R. 313.

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January 21. The judgment of the Court was delivered by BOYD, C.:—Agreement by the contractor Findlay with the owner Stevens on the 6th June, 1907, by which the contractor undertook to execute and perform the slating, tinning, and tiling work required in the erection and completion of a brick residence on or before the 1st day of August, 1907 . . . and to complete and finish all the said work within the time aforesaid, for \$342.

It is further provided that the work will be in every respect completed by the day provided for the completion thereof, subject only to such provision for an extension of time as therein provided.

It is also provided that there may be alterations in, additions to, or omissions from, the work, and an agreement may be made for the extension of the time (if any) which is to be granted by reason thereof.

If the contractor cannot finish the work within the time above specified (*i.e.*, 1st August), he may be discharged by the architect.

By another clause it is provided: "When there are different contractors on the works, each shall be responsible to the other for loss caused by failure to finish work in proper time . . . and any contractor suffering damage shall call the attention of the proprietor to it for action."

And the most important clause in the present action is this: "Should the contractor fail to finish the work at the time agreed upon, he shall pay by way of liquidated damages \$1 per day thereafter that the works shall remain incomplete; due allowance to be made for extension of time for additional work or alterations, and for delay occasioned by the default of contractor for other parts of

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the work, unless the proprietor has proceeded promptly against such other contractor."

Should any work be delayed upon (*sic*) the time mentioned in the agreement by weather or by strikes, the architect shall have power to extend the time for the completion of the work, making a just and reasonable extension for that purpose.

It appears that the carpenter's work was not done on the roof till the 3rd August, and that the slating and tiling part of the work could not be commenced before the expiration of the time-limit fixed in the contract (which was the 1st August).

The cases shew that the penalty clause (*i.e.*, the \$1 per day) is at an end when the contract limit expires—it is for the specific period only. If the contractor is so delayed by the default of the proprietor or his workmen that he is unable to begin his work till a date after the termination of the time fixed by the contract, and is only able to begin his work thereafter, his delay in the after-prosecution of the work is not to be visited by the imposition of the penalty of so much per day. There is in effect a new contract for the performance of the work at the contract price, but without any revival of the penalty clause. On delay in this after-prosecution of the work the contractor may be liable, but only on proof of damage sustained thereby. That is laid down in *Hamilton v. Moore*, as twice reported in 33 U.C.R. at pp. 275 and 520, founded on *Holme v. Guppy*, 3 M. & W. 387.

The terms of this contract are not essentially distinguishable from those under consideration in the cases cited. The time for doing the work was distinctly specified, *i.e.*, between the 6th June and the 1st August, 1907. At the day fixed for the completion of it, it had not been and could not have been begun, by the delay occasioned by the workmen who preceded this contractor's work on the roof. All the provisions in the contract for extension of time are referable to a condition of affairs existing after the work of this contractor has been entered upon, and, being prosecuted under the terms of the written contract, is delayed by any of the cases or causes provided for in terms. But they do not appear to be applicable to a case where the whole period allowed for doing the work has elapsed, before the contract could possibly begin. The architect has powers of extension during the currency of written contracts, but not thereafter. These powers do not, however,

affect the duration of the contract as to its time-limit; it is still for work to be done within a given limit, and beyond that the term as to penalties is not to be carried into any subsequent unwritten contract for the work: *Hudson on Building Contracts*, 3rd ed., pp. 531, 536.

Holme v. Guppy is the leading case, and it has been affirmed in many recent decisions, of which one of the last is *Dodd v. Churton*, [1897] 1 K.B. 562.

It is right, however, to send the case back, allowing proper amendments, to have the matter of damage for delay in the prosecution of the work ascertained upon proper evidence, as suggested in *Hamilton v. Moore*, p. 520.

Costs of appeal to the plaintiff; other costs of action to be disposed of on the reference back.

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[MEREDITH, C.J.C.P.]

McLAUGHLIN v. ONTARIO IRON AND STEEL CO.

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Jan. 26.

Master and Servant—Injury to Servant—Negligence of Fellow Servant—“Person Having the Charge or Control of an Engine or Machine upon a Railway”—Workmen’s Compensation for Injuries Act, sec. 3 (5).

An overhead crane in the defendants’ factory, operated by electric power, was used to raise and move heavy castings from place to place. M., the man who operated the crane, sat in a cage which ran upon rails, and from it he regulated the movement of the crane; when the crane was brought to the place where it was to be used, it was lowered and raised according to the direction of the foreman, who stood on the ground below, near the casting which was to be moved. The crane had been in use where the plaintiff, a foreman moulder, was working, and he had told M. that he did not require it any more, and, while M. was moving it away, it was raised above the plaintiff’s head, the cable parted, and a heavy hook attached to the cable fell and injured the plaintiff. In an action to recover damages for the injuries sustained, the jury found that the injuries were caused by the negligence of M. in hoisting the hook and the sheaf of the crane over the plaintiff’s head and letting it come in contact with the drum or something unknown, thereby breaking the cable:—

Held, that M. was a person having the charge or control of an engine or machine upon a railway or tramway, within the meaning of clause 5 of sec. 3 of the Workmen’s Compensation for Injuries Act, R.S.O. 1897, ch. 160; and the defendants were answerable for his negligence.

Clause 5, as it now stands, is much wider in its scope than as it stood in the first Ontario Act, 49 Vict. ch. 28.

Murphy v. Wilson (1883), 44 L.T.N.S. 788, distinguished.

Meredith, C.J.

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ACTION for damages for personal injuries sustained by the plaintiff owing to the negligence of the defendants, as alleged.

The facts appear in the judgment.

November 2, 1909. The action was tried before MEREDITH, C.J.C.P., with a jury, at Welland.

J. G. O'Donoghue, for the plaintiff.

W. M. German, K.C., and *R. H. Greer*, for the defendants.

January 26. MEREDITH, C.J.:—The plaintiff was employed in the defendants' manufactory as a foreman moulder, and received serious injuries on the 17th December, 1908, while engaged in his work, owing to a hook—a heavy part of an overhead crane—falling and striking him on the head, causing a fracture of the skull.

The fall of the hook was caused by the breaking of the steel cable by which it was suspended.

The case made by the plaintiff in his pleading is that "through the negligence of the defendants, their servants, employees, and agents, a portion of an overhead crane, owing to its being out of order through the negligence of the defendants, their servants, workmen, employees, and agents, fell upon the plaintiff, felling him to the ground and causing such serious bodily injury as to completely incapacitate him from working at his trade."

The jury negatived these grounds of negligence, and found that the appliances used in the defendants' shop for moving the castings were reasonably safe and sufficient for the purposes for which they were being used; but, in answer to a question, predicated on such a finding being made, whether the plaintiff's injuries were caused by any other negligence, they found that the injuries were caused by negligence on the part of the man who operated the crane, one McCauley, in hoisting the hook and the sheaf of the crane over the plaintiff's head and letting it come in contact with the drum or something unknown, thereby breaking the cable.

The plaintiff did not confine himself in the evidence which he adduced to the ground of negligence alleged in his pleading, but the case was tried and went to the jury at large, on the question of negligence, and I gave leave to the plaintiff to amend by alleging any ground of negligence which could be supported by the evidence.

McCauley, who controlled the movements of the crane, being a fellow servant of the plaintiff, the defendants are not answerable for his negligence, unless McCauley was a person having the charge or control of an engine or machine upon a railway or tramway within the meaning of clause 5 of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160.*

Before considering the effect of the legislation referred to, it is necessary to ascertain what were McCauley's duties and the nature and purpose of the appliances with the control of which he was intrusted.

The crane was an overhead one, operated by electrical power, and was used for the purpose of raising and moving from place to place heavy castings. McCauley sat in a cage which ran upon rails, and from it he regulated the movement of the crane, and, when the crane was brought to the place where it was to be used, it was lowered and raised according to the direction of the foreman, who stood on the ground below, near the casting which was to be moved.

At the time of the accident the crane had been in use where the plaintiff was working, and he had told McCauley that he did not require it any more, and, while McCauley was moving it away, it was raised above the plaintiff's head, the cable parted, and a hook weighing 250 pounds, which was attached to the cable, fell and struck the plaintiff on the head while he was stooping to examine his moulds.

It was argued by the learned counsel for the plaintiff that the cage with its appliances was an engine or a machine upon a railway or tramway, within the meaning of clause 5.

As clause 5 stood in the first Ontario Act, 49 Vict. ch. 28, it read, as did the fifth sub-section of sec. 1 of the English Act 43 & 44 Vict. ch. 42, "Who has the charge or control of any signal points, locomotive, engine, or train upon a railway," except that in the English Act there is a comma between "signal" and "points"

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* 3. Where personal injury is caused to a workman—

(5) By reason of the negligence of any person in the service of the employer who has the charge or control of any points signal, locomotive, engine, machine, or train upon a railway, tramway or street railway; the workman . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work.

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and no comma between "locomotive" and "engine," while in the Ontario Act there is a hyphen between "signal" and "points" and a comma between "locomotive" and "engine."

If clause 5 had remained in that form, the case of *Murphy v. Wilson* (1883), 48 L.T.N.S. 788, would be decisive against the plaintiff. In that case the accident was caused by the negligence of a person having the charge or control of a steam crane travelling upon rails, and it was held that the case did not come within sub-sec. 5 of sec. 1, the view of the Court being that "locomotive engine," especially having regard to the company in which it was found in the sub-section, meant a machine to draw trucks or trains upon a railway.

Clause 5 of sec. 3 of the Ontario Act was, however, amended in the consolidation of the Act respecting Compensation to Workmen in certain Cases, 55 Vict. ch. 30, and it now reads, "Who has the charge or control of any points, signal, locomotive, engine, machine, or train upon a railway, tramway or street railway."

This amendment has, I think, very much widened the scope of the enactment, and the word "machine" was probably introduced to meet such cases as, according to the views of the Judges who decided *Murphy v. Wilson*, did not come within its provisions.

It will be seen that, besides this, the position of the words "signal" and "points" was changed, and the clause as amended reads "points, signal," and the comma between "locomotive" and "engine" remains, the latter indicating that not one thing, a "locomotive engine," but two things, a "locomotive" and an "engine," were intended.

In my opinion, therefore, *Murphy v. Wilson* does not apply, and McCauley should be held to have been a person having the charge or control of an engine or a machine upon a railway within the meaning of clause 5, and the plaintiff is entitled to recover.

Doughty v. Firbank (1883), 10 Q.B.D. 358, is not, I think, opposed to the view I have taken, but, even if it were, the amendment made by 55 Vict. ch. 30, in my opinion, warrants the wider meaning I would give to the word "railway."

Although the evidence is, I think, sufficient to shew the nature of the crane and its appliances and the mode of operating it, I was desirous of having this made more clear by means of a photograph, but counsel for the defendants, though requested to fur-

nish one, and though one was furnished that was so indistinctly printed as to be useless, declined to furnish another, and, if the evidence on this point is not as clear as it might be, the responsibility for that rests on the defendants.

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[MULOCK, C.J.Ex.D.]

1910

Jan. 27.

HAGLE V. LAPLANTE.

Innkeeper—Neglect to Provide Fire Escape in Bed-room—Death of Guest in Fire—Evidence as to Cause—Liability—Statutory Duty—Penalty—R.S.O. 1897, ch. 264, secs. 3, 6.

In an action by the widow of H. to recover damages for his death by reason of the negligence or default of the defendant, it appeared that H. was a guest in the defendant's hotel, and was in bed at night in a bed-room not provided with a fire escape, as required by sec. 3, sub-sec. 1, of "An Act for the Prevention of Accidents by fire in Hotels and other Like Buildings," R.S.O. 1897, ch. 264, when a fire broke out; the fire completely destroyed the floorings of the hotel building, and H.'s body was found in the basement, but not under the room which he had occupied:—

Held, that the evidence warranted the conclusion that the absence of a fire escape compelled H. to seek some other means of escape, and that in the effort he lost his life; and thus the defendant's failure to perform his statutory duty was the direct cause of the death.

Held, also, that the object of the Act is to benefit the occupants of hotels and other buildings; and the plaintiff's cause of action arising from the breach of the statutory duty was not taken away by reason of the provision in the Act (sec. 6) that the proprietor of an hotel shall, on summary conviction for neglect to observe any of the provisions of the Act, incur a fine, no portion of which goes to the injured person or his family.

Gorris v. Scott (1874), L.R. 9 Ex. 125, and *Groves v. Wimborne*, [1898] 2 Q.B. 402, followed.

ACTION by the widow of George Hagle against the defendant, as the proprietor and keeper of the Windsor hotel in the town of Cornwall at the time of its destruction by fire on the night of the 23rd March, 1909, to recover damages for the death of Hagle. The facts are stated in the judgment.

January 13. The action was tried by MULOCK, C.J.Ex.D., without a jury, at Cornwall.

R. A. Pringle, K.C., and R. Smith, K.C., for the plaintiff.

G. J. Gogo and J. G. Harkness, for the defendant.

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January 27. MULOCK, C.J.:—The deceased was, at the time of the fire, a guest at the hotel, and lost his life in the fire in consequence, according to the plaintiff's contention, of the hotel not being provided with the appliances required by R.S.O. 1897, ch. 264, intituled "An Act for the Prevention of Accidents by fire in Hotels and other Like Buildings."

On the night in question the deceased occupied an interior room (No. 11), which opened upon a hall running northerly to the north end of the building. On the opposite side of the hall were bed-rooms, the most northerly one being a corner room—No. 15. The fire completely destroyed the floorings of the building, and on the day following two bodies were found in the basement, apparently under what had been room No. 15, and the evidence fully satisfies me that one of those bodies was that of the deceased, which, with contents of room No. 15, had fallen into the basement. One Walter Rice had been the occupant of room No. 15, at the time of the fire, escaping by jumping from the window.

The deceased had been a lodger at the hotel for some time, occupying room No. 11, and, according to the evidence of James Burns, retired to bed shortly before midnight. The fire occurred a couple of hours later. It is clear that the deceased was not smothered in his own bed, but must have proceeded from his room to the hall, and thence northerly towards room No. 15. There was a fire escape outside the building at the north end of the hall, and the inference is that the deceased was endeavouring to reach this escape. In this place in the hall he would be separated by but a short distance from room No. 15, and, when the hall flooring gave way and his body was precipitated to the basement below, it may have taken a direction slightly to the east, which would account for its being found apparently under what had been room No. 15. It does not, however, appear that any accurate measurement was taken as to the relative positions of his body when found and room No. 15, and, therefore, although the witness described the body as being found under room No. 15, it may not have fallen from that room; it did undoubtedly fall from a point near the fire escape, but could not possibly have fallen from room No. 11.

Sub-sections 1 and 2 of sec. 3 of the Act enact as follows:—

"(1) The keeper of every hotel shall, where the same is more

than two storeys in height, provide and keep in each of the sleeping apartments or bed-rooms which are situate above the ground floor, a fire escape for the use of guests occupying the same.

“(2) Such fire escape shall be sufficient within the meaning of this Act if it consists of a rope not less than three-quarters of an inch in thickness, and of sufficient length to reach from the room or apartment in which it is kept to the ground below, and is kept in a coil or other convenient position in each of the said bed-rooms or sleeping apartments; and if the outside window or opening of such sleeping apartments or bed-rooms is provided with proper, secure and convenient fastenings or appliances to which one end of the rope may be safely secured or fastened.”

The evidence shews that the buildings in question exceeded two storeys in height, and that room No. 11 in the third storey was a bed-room, and was not provided with a fire escape for the use of guests occupying the room. If it had been so provided, the fair inference would be that the deceased would have endeavoured to descend by such fire escape, and I think the evidence warrants the conclusion that its absence compelled him to seek some other means of escape, and that in the effort he lost his life. Thus, the defendant's failure to perform his statutory duty of providing room No. 11 with a sufficient fire escape was the direct cause of the deceased's death.

The defendant's counsel contended that the deceased's death might have been caused by suffocation in bed, and not by the absence of a fire escape, and, but for the circumstance of his body having been found elsewhere than under his own bed-room, there would have been no evidence to shew the actual cause of death.

In a case where there is a total destruction of the evidence, it would be impossible to prove the cause of death, and it seems to me that where the proprie or o a building has neglected his statutory duty of providing re escapes, the Act might properly be amended by casting the onus upon the proprietor of proving that the death was not caused by his negligence.

For the defence it was further argued that the only penalty because of non-observance of the defendant's statutory duty to provide fire escapes is that provided by sec. 6, which declares that in the case of neglect to observe any of the provisions of the Act, the proprietor shall, on summary conviction, incur a fine for each offence of not less than \$20 or more than \$200.

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Section 3 requires the proprietor of every hotel of more than two storeys in height to provide a fire escape for each room for the use of guests occupying the same; and sec. 5 requires him to keep posted up in each room a notice calling attention to the fire escape and containing full directions for the use of the same.

It is clear that the object of this Act is the safety of the guests of hotels in case of fire. If it had not provided a penalty for contravention of its provisions, there can be no doubt that a person injured because of the proprietor's breach of the statutory duty imposed upon him, would have had a cause of action because of such omission. Does, then, sec. 6 take away a cause of action otherwise given by the statute? How are the guests to be benefited by the Act, if the only penalty in case of breach of the statutory duty on the part of the proprietor is a fine, no portion of which goes to the injured person or his family?

In construing the statute it is necessary, as pointed out by Kelly, C.B., in *Gorris v. Scott* (1874), L.R. 9 Ex. 125, to consider for whose benefit the Act was passed, whether in the interests of the public at large or of a particular class of persons. If in the interests of the latter, then the cause of action is not taken away because the person neglecting the statutory duty may also be liable to a penalty.

In *Groves v. Wimborne*, [1898] 2 Q.B. 402, 415, Vaughan Williams, L.J., says: "It cannot be doubted that, where a statute provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, *primâ facie*, and if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty. I have equally no doubt that, where in a statute of this kind a remedy is provided in cases of non-performance of the statutory duty, that is a matter to be taken into consideration for the purpose of determining whether an action will lie for injury caused by the non-performance of that duty, or whether the Legislature intended that there should be no other remedy than the statutory remedy; but it is by no means conclusive or the only matter to be taken into consideration for that purpose. If it be found that the remedy so provided by the statute is to enure for the benefit of the person injured by the

breach of the statutory duty, that is an additional matter which ought to be taken into consideration in dealing with the question whether the Legislature intended the statutory remedy to be the only remedy."

And in the same case A. L. Smith, L.J., says (p. 407), referring to sec. 5 of the Factory and Workshop Act, 1878, which imposes upon employers the statutory duty of fencing machinery: "Could it be doubted that, if sec. 5 stood alone, and no fine were provided by the Act for contravention of its provisions, a person injured by a breach of the absolute and unqualified duty imposed by that section would have a cause of action in respect of that breach? Clearly it could not be doubted. That being so, unless it appears from the whole 'purview' of the Act, to use the language of Lord Cairns in the case of *Atkinson v. Newcastle Waterworks Co.* (1877), 2 Ex. D. 441, that it was the intention of the Legislature that the only remedy for breach of the statutory duty should be by the proceeding for the fine imposed by sec. 82, it follows that, upon proof of a breach of that duty by the employer and injury thereby occasioned to the workman, a cause of action is established. The question therefore is whether the cause of action which *primâ facie* is given by sec. 5 is taken away by any provisions to be found in the remainder of the Act. It is said that the provisions of secs. 81, 82, and 86 have that effect, and that it appears thereby that the purview of the Act is that the only remedy, where a workman has been injured by a breach of the duty imposed by sec. 5, shall be by proceeding before a court of summary jurisdiction," etc. And further on (p. 408) he says, referring to the fine provided by that Act: "This consideration and the fact that whatever penalty the magistrates inflict does not necessarily go to the injured workman or his family lead me to the conclusion that it cannot have been the intention of the Legislature that the provision which imposes upon the employer a fine as a punishment for neglect of his statutory duty should take away the *primâ facie* right of the workman to be fully compensated for injury occasioned to him by that neglect."

The object of the Act in question being to benefit the occupants of hotels and other buildings, in my opinion the cause of action arising from the breach of the statutory duty imposed by

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the Act is not taken away by the penalty to which the proprietor is also subject. I therefore think the plaintiff entitled to recover.

The deceased, besides his widow, left two children aged three and five years respectively. He was a steady, industrious workman, earning \$14 or \$15 a week. At the time of his death he was thirty years old; the widow appeared to be about the same age. As damages for the pecuniary loss sustained by the widow and children, I award the plaintiff the sum of \$2,500, to be apportioned \$1,500 to the widow and \$1,000 in equal shares to the children. The latter amount to be paid into Court and applied for the benefit of the infants. The plaintiff is entitled to her costs of the action.

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[IN CHAMBERS.]

Feb. 3.

RE MCKAY V. CLARE.

Division Courts—Jurisdiction—Splitting Cause of Action—Money Lent—Separate Loans—R.S.O. 1897, ch. 60, sec. 79.

The plaintiff lent sums of money to the defendant on five different days, all within a short period. Each of the amounts was advanced as a separate and distinct loan, without any reference to a further advance or loan of any kind, and upon the defendant's promise to pay in each instance, and with an offer to give his promissory note for each sum, if desired. The plaintiff brought two actions in a Division Court to recover the money lent: the first for two of the sums lent, amounting together to \$70; the second for the other three sums, amounting to \$100:—

Held, not a dividing of a cause of action into two actions for the purpose of bringing the same within the jurisdiction of a Division Court, which is forbidden by sec. 79 of the Division Courts Act, R.S.O. 1897, ch. 60.

Re Gordon v. O'Brien (1886), 11 P.R. 287, and *Re Clark v. Barber* (1894), 26 O.R. 47, distinguished.

The King v. Sheriff of Herefordshire (1831), 1 B. & Ad. 672, followed.

MOTION by the defendant for prohibition to the 7th Division Court in the county of Essex. The facts are stated in the judgment.

February 1. The motion was heard by BOYD, C., in Chambers.
Frank McCarthy, for the defendant.

J. T. White, for the plaintiff.

February 3. BOYD, C.:—The dealings between the plaintiff and defendant stand thus. On the 3rd September, 1909, the

plaintiff lent \$20 to the defendant at Fort Erie, on a promise to return or repay it in a short time. On the 16th September the defendant wrote from Montreal asking a further loan from the plaintiff, and this was responded to by sending a cheque for \$50. On the 25th September the parties met in Toronto, and another loan of \$50 was made to the defendant. The defendant made another application from Hamilton to the plaintiff, who lived in Toronto, in consequence of which a cheque for \$25 was given to the defendant. On the 2nd October they met in Hamilton, and another loan of \$25 followed. The plaintiff brought two actions in the Division Court, one for the first \$50 and \$20, amounting to \$70; and another for the remaining \$100. The cases went to trial, and the evidence of the plaintiff was that each of the amounts advanced was a separate and distinct loan, without any reference to any further advance or loan of any kind, and upon the defendant's promise to pay in each instance, and with an offer to give his several promissory note for each sum, if desired.

Counsel for the defendant moved, objecting to the jurisdiction, on the ground that the whole was one transaction, suable as one cause of action for money lent, and could not be split into two actions: R.S.O. 1897, ch. 60, sec. 79.* The objection was overruled, and judgment entered for the plaintiff in both cases.

The objection is now renewed by way of motion for a writ of prohibition, and the cases cited were *Re Gordon v. O'Brien* (1886), 11 P.R. 287, 294, and *Re Clark v. Barber* (1894), 26 O.R. 47. *Re Gordon v. O'Brien* held that monthly gales of rent being in arrear for three months must be sued for in one action, and could not be divided into three plaints in the Division Court. *Re Clark v. Barber* held the same as to instalments and interest overdue on a contract of sale. Some objection was made to the latter case in *Re McDonald v. Dowdall*, 28 O.R. 212 (January, 1897), and

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* 79.—(1) A cause of action shall not be divided into two or more actions for the purpose of bringing the same within the jurisdiction of a Division Court, and no greater sum than \$100 shall be recovered in any action for the balance of an unsettled account, nor shall any action for any such balance be sustained where the unsettled account in the whole exceeds \$400. R.S.O. 1887, c. 51, s. 77.

(2) Where a sum for principal and also a sum for interest thereon is due and payable to the same person upon a mortgage, bill, note, bond or other instrument, he may notwithstanding anything in this section contained, but subject to the other provisions of the Act, sue separately for every sum so due. 60 V. c. 14, s. 5

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legislation followed in April, manifested in the statute 60 Vict. ch. 14, sec. 5 (now R.S.O. 1897, ch. 60, sec. 79 (2)). The extent to which this modified *Re Clark v. Barber* is discussed in *Re Real Estate Loan Co. v. Guardhouse* (1898), 29 O.R. 602, 604. Many nice distinctions arise in determining what is and what is not splitting a cause of action, as appears, for instance, in *Re Ball v. Bell* (1895), 26 O.R. 123, which is reported as reversed at p. 601.

However, this present case stands clearly apart from those cited, which are decisions on causes of action arising out of one controlling contract. The same idea of connection or continuity exists where liabilities are incurred in a series of dealings which are linked together, in this sense that each dealing is not intended to terminate with itself but to be continuous, so that one item shall go with the next item and so form one entire demand. Hence it is that tradesmen's bills and merchants' accounts are debts arising upon a continuous account of book entries made in the ordinary course of dealing, and are regarded as entire, not to be split for the purpose of separate suits. But such is not the case here, according to the evidence and finding of the Judge. These claims, while similar in character, are yet for moneys lent as distinct loans at different times and places, but pursuant to no course of dealing, and not necessarily to be massed *en bloc* for the purpose of litigation.

The present case is within the authority of *The King v. Sheriff of Herefordshire* (1831), 1 B. & Ad. 672. A. became indebted to B. for the carriage of a parcel of goods; he afterwards incurred another debt for the carriage of another parcel; and was sued for the amounts in two actions in the lower Court. Held, that the causes of action were distinct, and that the plaintiff was entitled to sue separately for each demand. Tenterden, C.J., said: "The two items . . . are perfectly distinct debts, the one having no connection with the other; when the defendant incurred the debt stated in the first item, the plaintiff might have sued him for it in the County Court, and his having incurred another and distinct debt with the plaintiff afterwards should not, I think, have the effect of depriving the plaintiff of his remedy in the County Court for the first debt." See *Harvey v. McPherson* (1903), 6 O.L.R. 60.

I would, therefore, refuse the application with costs.

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Feb. 15.

Master and Servant—Dismissal of Servant—Justification—Confidential Relationship—Domestic Duties—Immoral Conduct.

The plaintiff was employed by the defendant to assist him in his business of sheep-raising; the plaintiff lived in a house owned by the defendant near the defendant's dwelling-house, and, during the defendant's frequent absences, was left in charge of the business; at such times he was often in the defendant's house, of which the defendant's wife and daughter and other children and a maid servant were inmates. The plaintiff, having been so employed for six or seven years, was re-engaged for a year from the 12th February, 1908, but was discharged by the defendant in July of that year. The reason for the dismissal was that the plaintiff had in June boasted to him (the defendant) of indecent and immoral conduct, occurring some years before, and had previously made the same statement to a neighbour, who communicated it to the defendant:—

Held, that the dismissal was justified; and the fact that the indecent conduct was an isolated act, occurring several years before, was not an exculpation, the defendant's knowledge being recent.

Seemle, per BOYD, C., that in the case of household servants, or those who have access freely to the household any moral misconduct (not of trivial character) will justify dismissal.

Review of the authorities.

Judgment of the County Court of Middlesex reversed.

AN appeal by the defendant in an action in the County Court of Middlesex, from the judgment of MACBETH, Co.C.J., in favour of the plaintiff for the recovery of \$120 in addition to \$210 paid into Court by the defendant.

The plaintiff, having been in the defendant's employment for six or seven years, made a contract for re-engagement for one year from the 12th February, 1908, the defendant agreeing to pay him for his services \$500 for the year's labour, "with free house and one cow kept"—the plaintiff boarding himself.

The plaintiff was a married man, with a family; he lived in a house owned by the defendant, about thirty rods from the defendant's dwelling-house. The defendant was a farmer, and raised thorough-bred sheep on a large scale for the markets of the Western States; he was often away from home on business, and during his absence would leave the plaintiff in charge, and at such times the plaintiff would be often in the defendant's house, using the telephone, attending to correspondence, and the like.

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On the 13th July, 1908, the defendant discharged the plaintiff, who brought this action for wrongful dismissal.

The defendant pleaded that the plaintiff was discharged "for good reason," and a tender of five months' wages, *i.e.*, from the 12th February to the 12th July, amounting to \$208.50, and he brought \$210 into Court.

The good reason for the dismissal was said to consist of: (1) a statement alleged to have been made by the plaintiff in June, 1908, to the defendant as to certain indecent behaviour of the plaintiff towards Miss A., and a statement, almost in the same words, alleged to have been made by the plaintiff to one Linden, nearly two years before; (2) a statement alleged to have been made to the defendant by the plaintiff as to the latter's adultery with Miss X.

The County Court Judge thought this was insufficient to justify the dismissal, and gave judgment for the plaintiff as above.

February 8. The appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ.

G. S. Gibbons, for the defendant. There is no appeal as to the amount of damages awarded at the trial. The defendant pleads justification in dismissing the plaintiff from his employment as he did. The plaintiff boasted, truthfully or untruthfully, of his relationship with women, and the defendant was right in refusing to have a person of that character in his employment, especially when the nature of the employment made it necessary that the plaintiff should have access to the defendant's house, and that on occasions when the defendant would be away from home on business for lengthy periods, the plaintiff must be left in charge of the defendant's affairs, and have the freedom of the defendant's home, where were the defendant's wife and children. Such boasting rendered the plaintiff unfit for this situation. The reputation of members of the defendant's family might be jeopardised by the continued employment of such a man: *Cyc*, vol. 26, pp. 990, 991.

P. H. Bartlett, for the plaintiff. Boastfulness on the part of a servant is no ground for breach of a contract of employment. The plaintiff was employed under a written contract. He had been more than six years in the defendant's employment without any objection having been taken to him. He contracted to do

his work well, and a breach of that contract was necessary to justify his dismissal without notice. If the statements were made by the plaintiff to the defendant, then the defendant knew at the time that the acts of misconduct therein referred to were committed (if at all) some time prior to the commencement of the then current contract of hiring: *Andrewes v. Garstin* (1861), 10 C.B.N.S. 444. Words are not enough to justify discharge; bad conduct is necessary. The immorality or misconduct which will justify the dismissal of an employee must be prejudicial to his master's interests. See also *Smith's Law of Master and Servant*, 6th ed., p. 102.

Gibbons, in reply. The injury to the master's interests justifying dismissal need not be pecuniary; other injury to his interests will suffice.

February 15. BORD, C.:—The plaintiff's case stands thus on the evidence. Having been seven years in the defendant's employment under a yearly hiring, he was dismissed on the 12th July, 1908, at the end of five months of the year, and no cause assigned.

The defendant's justification stands thus on the evidence. Towards the end of June the master spoke in commendatory terms of Miss A., and the servant said she was not so fine and straight as the master thought, for he had had his hand up her clothes and on her private parts. A few days afterwards he said he had slept with Miss X. before she was married. The master thereafter went to a neighbour, Linden, and told him he was thinking seriously of dismissing the servant Denham. Being asked why, he told him. Whereupon Linden told him that Denham had said the same thing to him about Miss A. The defendant then made up his mind to discharge the plaintiff, as he did not consider him a fit and proper person to take care of his house and business. For he was away from home a good deal, and had female servants about the place, and the plaintiff was in the habit of being in the house, answering telephone messages, writing letters, and attending to the business of the master in connection with raising and disposing of a high breed of sheep.

Linden corroborates the defendant, and says that the plaintiff told him of Miss A. about November, 1906, when they were on

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their way to Chicago about the sheep business, and that the occurrence happened in the defendant's barn, and this Linden told to the defendant.

Linden said that Miss A. was married now, he guessed, for about two years, and that she was about twenty-two or twenty-three years old. The plaintiff says that she has been married five years or more, and is now thirty years old. He explains that what happened with her was accidental, and that it was in the first year that he was in the defendant's employ. He denies saying anything about Miss X. to the defendant. He affirms that he told the defendant about the accident with Miss A. at the time it happened, and denies that he spoke of it in June before the dismissal. He says that the defendant frequently asked him to come back after the discharge—this is denied by the defendant, and he is rather corroborated by Denham's wife, who says that one day Denham asked Patrick if he, Patrick, was going to take Denham back, and Patrick said: "No; I do not intend to: what were you doing with your hand underneath Miss A.'s clothes?"

The learned trial Judge remarks: "I should be inclined to hold on this evidence that the statement first mentioned was made by the plaintiff in the words charged (as to Miss A.). As to the second, I do not think I could find it to be proved that the plaintiff made it. But, if I found as a fact that both of these statements were made as alleged, I am still of the opinion which I expressed at the close of the trial, that the plaintiff's dismissal was not justified."

Judging from the whole of the evidence, I should deem the defendant to be more worthy of credit than the plaintiff, but, taking it that only the first statement was made, I am not able to agree with that view of the law which requires the master to keep a servant who so "boasts" in his confidential service. The master's family consisted of wife and children (one daughter) and servant maid, and in the master's absence the plaintiff had free entry and access to the house to transact ordinary and confidential business of the master, and the master deemed the moral character of the servant, as disclosed by himself, to unfit him for this position. What was told by the servant was of criminal character (if the girl was as young as Linden says): it was, in any view, an immoral and indecent act, upon which the plaintiff's mind appeared

to dwell with satisfaction, as he told of it to Linden in 1906, and again to the defendant in 1908. It was not a matter that the defendant could or should investigate so as to implicate the female. He had to accept what the servant said; and, whether he spoke truly or untruly, it was alike discreditable to boast of the act and disparage the woman.

That the occurrence, whatever it was, happened eight years ago, and that it was apparently an isolated episode in the servant's history, are by no means sufficient exculpations in a legal point of view—if the master's knowledge is but recent, as in this case.

In 1855 it was said by Parke, B., in *Lomax v. Arding*, 10 Ex. 734, 736: "The question, in what case and upon what grounds an employer has the right to discharge a person employed by him, has only been considered in modern times, and is not fully settled." He then refers to instances of misconduct in decided cases, and says, "But there may be many other matters which would justify a dismissal by the master."

In *Pearce v. Foster* (1886), 17 Q.B.D. 536, Lopes, L.J., says: "The misconduct, according to my view, need not be in the carrying on of the service or the business. It is sufficient if it is conduct which is prejudicial or likely to be prejudicial to the interests or to the reputation of the master, and the master will be justified, not only if he discovers it at the time, but also if he discovers it afterwards, in dismissing the servant:" p. 542.

And, again, Lord James of Hereford puts it thus in *Clouston & Co. Limited v. Corry*, [1906] A.C. 122, at p. 129: "Misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal."

This is so, even as regards isolated acts, when the consequences are not likely to be confined to the occasion. As said by Channell, J., in *Baster v. London and County Printing Works*, [1899] 1 Q.B. 901, 904: "As to whether a single act would justify dismissal, that depends on the character of the act and the duties of the man who does it." And this line of view as to single acts is fully explored in *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888), 39 Ch. D. 339, at pp. 358, 363, 370. The language of Fry, L.J., in that case, where he says, "I do not feel judicially satisfied that it is an isolated case," at p. 370, may have pertinence to the present dispute.

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The expression is used in the text-books that the master may dismiss for any "gross moral misconduct." Perhaps the modern view would eliminate the "gross" and hold with the view of Parke, J., in the case of household servants, or those who have access freely to the household, that any moral misconduct (not of trivial character) would justify dismissal: *Callo v. Brouncker* (1831), 4 C. & P. 518; and see comments on that case in *Read v. Dunsmore* (1840), 9 C. & P. 588, 594.

The master may well have inferred here that the mind of the servant was dwelling with satisfaction on this indecent occurrence, and very outspoken in reference to it, though he only knew of it shortly before the dismissal. The plaintiff was judged from his own admissions or boastings, and the master thought him a person of lewd mind and habit whom it was not desirable to admit into the family circle. I cannot account this to be setting too high a standard to be observed in the relationship of service, whether wholly or partially domestic.

In my opinion, the master was justified, and the action fails. Judgment to dismiss with costs.

LATCHFORD, J.:—In the discharge of the plaintiff's duties it was necessary that he should be frequently in his master's house, from which the master was often absent. The master's wife, a minor daughter, two other children of tender years, and a maid servant, were on such occasions alone in the house. After the defendant had learned of the true character of the plaintiff as revealed to himself and to Linden, he had reason to consider it inimical to his interests that such a man should, especially in his absence, have access to his home. There was the danger that actual misconduct would be attempted, or that the plaintiff would boast that misconduct had been permitted by members of the defendant's household. Upon the authorities cited in the judgment of my Lord the Chancellor, which I have had an opportunity of reading, the defendant was, I am convinced, justified in dismissing the plaintiff.

The appeal should be allowed with costs, and the action, except as to the amount paid into Court, dismissed with costs.

MAGEE, J.:—I agree in the result.

[IN CHAMBERS.]

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Jan. 25.
Feb. 18.

Security for Costs—Plaintiff out of Ontario—Increased Security—Powers of Master in Chambers—Order Made after Judgment and pending Appeal to a Divisional Court—Discretion—Costs already Incurred—Stay of Proceedings—Con. Rules 42, 825, 1204, 1208.

Where the action had been tried and judgment given dismissing it, and the plaintiff was appealing to a Divisional Court:—

Held, that, the plaintiff being out of the jurisdiction, the Master in Chambers had power to make an order for increased security for costs, notwithstanding that the order, by virtue of Con. Rule 1204, effects a stay of proceedings, and that, by Con. Rule 42, clause 17 (d), staying proceedings after verdict or judgment is excluded from the Master's jurisdiction, and notwithstanding the provision of Con. Rule 825 that no security for costs shall be required on an appeal to a Divisional Court.

Bentsen v. Taylor, [1893] 2 Q.B. 193, and *Tanner v. Weiland* (1900), 19 P.R. 149, followed.

Held, also, that, on the facts of this case, the Master's discretion was properly exercised in making an order for increased security; and that, under Con. Rule 1208, there was power to make the additional security applicable to past as well as future costs.

Held, also, that the order should not contain a stay of proceedings, that being provided for by Con. Rule 1204.

Order of the Master in Chambers varied.

MOTION by the defendants the Otisse Mining Co. for an order for increased security for costs.

January 21. The motion was heard by the Master in Chambers.

F. Arnoldi, K.C., for the applicants.

R. F. Segsworth and *Eric N. Armour*, for the other defendants.

T. P. Galt, K.C., and *Grayson Smith*, for the plaintiff.

January 25. THE MASTER IN CHAMBERS:—Since the order made in this case on the 22nd April, 1909, and reported in 13 O.W.R. 997, the action has been tried and judgment given dismissing it with costs. The plaintiff has appealed to a Divisional Court, and the motion has been set down and is ready for hearing. It is not denied that the costs to date are in excess of the amount of \$1,000 by a considerable sum. This I have directed to be ascertained by taxation. But it was strongly contended that there was no power now to order any additional security, or that, at least, it was not competent for the Master in Chambers to make such order. And

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further, that, even if he could make the order, he could not impose a stay until his order was complied with.

With the first of these grounds it is not necessary to deal at length. No authority was cited for it, and as an abstract proposition it seems to conflict with the opinion of Osler, J.A., in *Exchange Bank v. Barnes* (1884), 11 P.R. 11, and in the later case of *Small v. Henderson* (1899), 18 P.R. 314, though on the facts in each of those cases an original order for security was refused. In both the plaintiff had recovered judgment which the defendants were appealing against.

Here the action has been dismissed, and the plaintiff is appealing.

In the last case of *Standard Trading Co. v. Seybold* (1903), 6 O.L.R. 379, the same learned Judge says (at p. 380): "I am aware that the practice on the subject of granting additional security has been relaxed by the modern rules." The action is still pending, even an appeal to the Court of Appeal being only a step in the cause.

It would be strange if the Court was unable to give effect to its own order made at the inception of the case. If its power to give indemnity to the defendant is terminated by a judgment at the trial in his favour, it would be a striking illustration of "keeping the promise to the ear, but breaking it to the hope."

Then the next question is, can such additional security be ordered by the Master in Chambers?

The negative is based on the words of Rule 42, clause 17 (d), by which the power of "staying proceedings after verdict, or on judgment after trial or hearing before a Judge," is excepted from his jurisdiction.

Unless in this case, as on making the order in the first instance under Rule 1198, proceedings can be stayed until security is given, the order would be a mere nullity, as it could not otherwise be enforced. But it is argued that, as the Master in Chambers cannot stay proceedings after judgment directly, he has no power to do so indirectly. That this is a sound principle is elementary; but it can be said in answer that the exception would be complied with by not interfering with the effect of a judgment so as to delay or interfere with the successful party. But, without pressing that, it does seem fair to hold that the language of Rule 1198 cited above is necessarily applicable to any order made thereunder. And, just

as the Privy Council has decided that under the British North America Act either the Provincial or the Federal Legislature can deal with a subject matter which properly comes within its jurisdiction, though in some aspects of its legislation it may seem to exceed its powers, so here, if the Master in Chambers has power to order further security, it seems to follow that he has the power in such cases to stay proceedings in an action, although he could not do so otherwise on a motion for that purpose only.

Perhaps I ought not to pass over an argument which was based on the language used by me in refusing the order asked for as reported in 13 O.W.R. 997. When it is said there that the bond already given was "ample for the defendants' party and party costs up to and inclusive of the trial," all that was meant was that this was enough to allow the plaintiff to have a trial, as I think is made clear by the concluding sentence.

It was suggested that the bond is really only for \$1,000, and not for \$2,000, as I had supposed. Even then, no experienced solicitor would venture the opinion that in this action \$2,000 would cover the costs of the three separate sets of defendants, if successful, taxed as between party and party only.

As the plaintiff's counsel are anxious to have the matter disposed of so that they can appeal at once, and have their case speedily heard by the Divisional Court, I now give judgment on the application and make an order that additional security be given for such amount as the taxation may shew to be reasonable, and "staying proceedings until such security is given."

The costs of this motion will be in the cause.

The plaintiff appealed from the Master's order.

February 8. The appeal was heard by MEREDITH, C.J.C.P., in Chambers.

T. P. Galt, K.C., and *Grayson Smith*, for the plaintiff.

F. Arnoldi, K.C., for the defendants the Otisse Mining Co.

Eric N. Armour, for the defendants Warren, Gzowski, & Loring.

February 18. MEREDITH, C.J.:—Appeal by the plaintiff from an order of the Master in Chambers made on the 25th January, 1910, requiring the plaintiff to give further security for the costs of the action.

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By an order made on the 3rd November, 1908, the plaintiff was required to give security to answer the defendants' costs of the action "in the sum of \$1,000 to be paid into Court, or otherwise by good and sufficient bond in two sureties in a penalty of \$2,000."

The plaintiff gave security by a bond of himself and a guarantee company—the obligors' liability under which, it was said on the argument, is to answer the costs to the extent of \$1,000 only. I find, however, on examination of the bond, that the liability of the obligors is to answer the costs to the extent of \$2,000.

On the 22nd April, 1909, the defendants the Otisse Mining Co. applied to the Master in Chambers for an order that the plaintiff should "give increased security for the costs of the action to the amount of \$2,000 beyond the sum of \$1,000 for which security had been given," and that application was refused, for the reasons stated by the Master, which are reported in 13 O.W.R. 997.

The action then proceeded to trial, with the result that it was dismissed with costs.

On the 13th December, 1909, the plaintiff gave notice of appeal to a Divisional Court from this judgment, and the motion has been set down for argument at the present sittings.

On the 17th January, 1910, the defendants the Otisse Mining Co. launched a motion for increased security, and it was on that motion that the order now in appeal was made.

The appellant's counsel attack the jurisdiction of the learned Master to make the order, and to stay the proceedings until the further security ordered is given, and they contend that in any case increased security should not have been ordered, and at all events in respect of past costs.

I think it clear that the Master had jurisdiction to make the order, and that the application was properly made to him. In *Bentsen v. Taylor*, [1893] 2 Q.B. 193, an exactly similar question arose, and it was held by the Court of Appeal that such an application should be made in Chambers; and *Tanner v. Weiland* (1900), 19 P.R. 149, decides that Con. Rule 825* does not prevent an order for security for costs being made, when the plaintiff is out of the jurisdiction.

* 825. No security for costs shall be required on a motion or appeal to a Divisional Court.

The question as to the power of the Master to stay the proceedings is purely academic, as the effect of his order, without any provision of that kind, is to stay the proceedings until the security is given: Con. Rule 1204.*

I think, however, that there is no doubt that the Master had this power. Consolidated Rule 42, clause 17 (*d*), which excludes from the jurisdiction of the Master in Chambers "staying proceedings after verdict, or on judgment after trial or hearing before a Judge," can have no application to an order having that effect which the Master in Chambers has undoubted authority to make, such as an order for security for costs. It was intended to prevent the Master in Chambers from staying proceedings to enforce such a verdict or judgment—in other words, staying the operation or execution of the verdict or judgment.

The objection to the jurisdiction, therefore, fails.

Being of opinion that the Master had jurisdiction to make an order for increased security, the only questions remaining to be considered are: (1) whether the discretion of the learned Master was properly exercised; and (2) whether the additional security should be confined to future costs.

There are, no doubt, to be found in English cases expressions to the effect that the increased security should not extend to past costs: *Sturla v. Freccia*, [1877] W.N. 161; *Republic of Costa Rica v. Erlanger* (1876), 3 Ch.D. 62, *per* James, L.J., at p. 69. In *Brocklebank v. Lynn S.S. Co.* (1878), 3 C.P.D. 365, it was, however, held that security for costs is not necessarily confined to future costs, but, when applied for promptly, may be extended to costs already incurred. Whatever may be the practice in England, where there is no such Rule as our Con. Rule 1208, there is, I think, under that Rule, power to make the increased security extend to costs already incurred.

The Rule is as follows: "1208. The amount of security, whether directed to be given by an order on *præcipe* or otherwise, may be increased or diminished from time to time by the Court or a Judge."

It is the amount of the security "directed to be given by an order" that may be increased or diminished, and as in this case

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* Where security for costs is ordered, proceedings in the action shall be stayed, from the service of the order until the security is given, and, if given by bond, until the bond is allowed.

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security has been given to the amount of \$2,000, and that security is for all the costs, past as well as future, the increase of that amount necessarily makes the security as increased applicable to the same costs.

The Master did not fix the amount of the additional security, but reserved the fixing of it until the taxation of the defendants' costs, which is now proceeding, is completed.

It was said, and apparently acquiesced in by counsel on both sides, that the costs when taxed will amount to \$3,000 or somewhat more, and it appears to me not unreasonable that the security should be increased.

Having regard to what was said by Osler, J.A., in *Standard Trading Co. v. Seybold*, 6 O.L.R. 379, "I do not think it" (*i.e.*, the practice) "admits of a plaintiff being checked at every stage of the action by ordering security dollar for dollar for all costs incurred, or which by possibility may be incurred, without regard to the conduct of the party" (p. 380), in all of which I agree, I think that if the additional security is fixed at \$1,000 it is all that the plaintiff should be required to do to entitle him to proceed with his action.

The order will, therefore, be varied by so providing and by eliminating the stay of proceedings, leaving that to be governed by Con. Rule 1204; and the costs of the motion and of the appeal will be in the cause.

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STECKER V. ONTARIO SEED CO. LIMITED.

Feb. 21.

Contract—Transfer of Assets of Partnership to Incorporated Company—Assumption of Liabilities—Direct Right of Action by Creditors of Partnership against Company—Promise to Pay—Correspondence—Promissory Note—Election to Accept Company as Debtor—Novation.

A trading partnership, indebted to the plaintiffs for goods supplied down to the 1st April, 1909, on the 10th of that month agreed to transfer all its assets and property to a new concern to be incorporated; the new company to assume the liabilities of the partnership. The company was incorporated under the Ontario Companies Act on the 15th April, 1909, and certificated as entitled to begin business on the 22nd June, 1909. After the incorporation, the partnership transferred its assets and property to the company, and the prospectus of the company, filed with the Provincial Secretary, set forth that the company had "purchased the former business and assets, subject to the liabilities of the said firm, which are to be assumed by the new company." A copy of this prospectus was sent by the company to the plaintiffs on the 6th May, 1909, with a letter regretting that the new company could not send a cheque, but saying that they "expected to be shortly in a position to meet your account," and trusted that an extension of time would be given. Correspondence followed during some months, the plaintiffs pressing for payment and the company promising to pay and asking for time. A promissory note made by the company and by the members of the old partnership was in the course of the correspondence sent to the plaintiffs, but returned by them as not satisfactory. In October, 1909, the plaintiffs began this action, against the new company and the members of the old partnership, to recover payment of their debt, but did not press for judgment against the members of the partnership:—

Held, that the company having made a direct promise to the creditors to pay the debt, and having negotiated for an extension of time, there was sufficient evidence of the creation of the relationship of debtor and creditor to give a direct right of action; *MAGEE, J.*, dissenting.

Osborne v. Henderson (1889), 18 S.C.R. 698, distinguished.

Held, also, that, notice having been given to the plaintiffs of the incorporation of the company and the taking over of the old assets and the assumption of the old liabilities, and the assent of the plaintiffs being in effect asked, and they acceding and giving time, there was sufficient evidence of an election by the plaintiffs to accept the new company as their debtor in substitution for the original debtors; *MAGEE, J.*, dissenting.

Judgment of *FALCONBRIDGE, C.J.K.B.*, affirmed.

APPEAL by the defendant company from the judgment of *FALCONBRIDGE, C.J.K.B.*, in favour of the plaintiffs in an action to recover from the defendant company and the defendants Herold and Kusterman, who did business, before the incorporation of the defendant company, under the name of "The Ontario Seed Company," of the amount of the indebtedness of the defendants Herold and Kusterman to the plaintiff for goods supplied down to the 1st April, 1909. The plaintiffs alleged that the defendant company

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had assumed the payment of the debts of the business carried on by the defendants Herold and Kusterman, and contracted with the plaintiffs to pay the amount due to them. The judgment appealed against awarded the plaintiffs \$1,621.50 and interest against the defendant company. The plaintiffs did not press for judgment against the defendants Herold and Kusterman.

W. M. Reade, K.C., for the appellants. The defendants Herold and Kusterman were the Ontario Seed Company. They contracted with the plaintiffs for the purchase of goods. They afterwards formed a joint stock company, namely, the Ontario Seed Company Limited—the defendants. The appellants are not liable, even if they took over the assets of the Ontario Seed Co., there being no privity of contract: *Osborne v. Henderson* (1889), 18 S.C.R. 698; *Tweddle v. Atkinson* (1861), 1 B. & S. 393. The defendants Herold and Kusterman do not contest their liability. There was no novation. A valid consideration is necessary in these cases; here there was none: *Lodge v. Dicas* (1820), 3 B. & Ald. 611; *Am. & Eng. Encyc. of Law*, vol. 21, pp. 669, 671, 672.

M. A. Secord, for the plaintiffs. The appellants are liable. The plaintiffs need not shew novation. This is a case of a debtor trying to get out of a debt. The old company's assets were to be taken over by the new company, "subject to the liabilities of the old company." Letters of the new company shew that they were promising to pay the old company's debts: *Earl of Oxford v. Rodney* (1807), 14 Ves. 417. There was novation. The plaintiffs are Americans, and, under American authorities, where a person assumes liabilities and receives the assets, he is directly liable: *Clark v. Howard* (1896), 150 N.Y. 232. The plaintiffs accepted the liability of the new firm: *Rolfe v. Flower* (1865), L.R. 1 P.C. 27, at p. 44. The plaintiffs could not have sued the old firm: *Scarf v. Jardine* (1882), 7 App. Cas. 345. The appellants are liable by estoppel. They led the plaintiffs to believe that they would pay: *Scarf v. Jardine (supra)*; *Cluff v. Norris* (1909), 19 O.L.R. 457.

February 21. *BORD, C.*:—The "Ontario Seed Company" was a partnership composed of the defendants Herold and Kusterman, and they became indebted to the plaintiffs in the sum of over \$1,600

for goods supplied down to the 1st April, 1909. On the 10th April an agreement was made by which this company should transfer all its assets and property to a new concern to be incorporated and called "The Ontario Seed Company Limited," the present defendants. It was a term of the transfer that it was to be subject to the liabilities of the old partnership, which were to be assumed by the new corporation. The assets and property turned over were valued at \$41,000, and the liabilities to be taken over and provided for were ascertained to be \$28,175, of which the plaintiffs' was one. A bill of sale was duly executed after the incorporation. The patent issued to the defendants on the 15th April, 1909, and they were certificated as entitled to begin business on the 22nd June, 1909. The prospectus of the company, filed in the proper office, set forth that this company had "purchased the former business and assets, subject to the liabilities of the said firm, which are to be assumed by the new company." A copy of this prospectus was sent by the defendants the company to the plaintiffs on the 6th May, 1909, with a letter regretting that the new company could not send a cheque, but "expected to be shortly in a position to meet your account," and trusted that an extension of time would be given.

The directors of the new company were the two defendants (members of the old firm) and three others, Ross, Uffelman, and Brotherton. This explains the plaintiffs' letter of the 2nd June, 1909, answering that of the 6th May: "We feel that the account should have your attention, and that the matter of your changing the style of your company should not interfere with the payment of our account."

Kusterman replied in a letter of the 9th June: "We expected to have the new company completed before this . . . We must ask you to let our account stand till we can complete our arrangements . . . We will of course pay you the interest."

The plaintiffs sent an answer on the 15th June, addressed to the seed company, and said in part: "We would suggest that you give us notes signed personally by the interested responsible parties in your anticipated organisation, which settlement would be satisfactory to us at the present time."

The Ontario Seed Co. say in the next letter, the 19th June, 1909: "We hope in a few days to make you a definite proposal."

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The plaintiffs call attention in a letter of the 3rd July, to the company, that two weeks have elapsed and no proposition made. In a letter of the 9th July, the company say their Mr. Herold will call on the plaintiffs in Rochester on the 12th July to arrange. On the 23rd July the plaintiffs write the company that Herold's call had no satisfactory result, and press for payment of the past due balance.

On the 16th July the defendants the company write, on letter paper headed with the corporate name: "We take from your letter that you would like to have some acknowledgment of this debt, and hand you enclosed note, adding interest as per statement" (which shews \$1.609).

The plaintiffs write on the 3rd August, acknowledging note in settlement of account to date: "While this of course closes up the matter, and is an acknowledgment of the debt owing us, it does not satisfy us. . . . The note should be indorsed by your board of directors personally, and we return note and trust you will receive our suggestion favourably."

On the 6th August Kusterman writes for the company defendants: "We will take the matter up with the other directors at meeting on 12th August, and no doubt will arrange to your entire satisfaction."

The secretary-treasurer of the defendant company writes a long explanatory letter of the 16th August, 1909, giving history of incorporation and results of the shareholders' meeting of the 12th August, and says it was found that, allowing things to develop undisturbed, all liabilities could be paid within one year . . . "About the middle of September we expect to be able to pay you the first instalment of your account, and state definitely how soon the balance can be settled."

On the 19th August the plaintiffs write the company acknowledging the receipt of both letters of the 6th and 16th August, and urge that attention be given to the plaintiffs' letter of the 3rd August without further delay.

The defendant company's letter of the 20th August says Kusterman was in the States—"Will attend promptly to request on his return. You may be assured . . . that we will pay your account in full with interest, as soon as possible."

The company's letter of the 27th August: "We are sending you

note of the new firm signed also by writer (Kusterman) and Herold, who were formerly in partnership under the name of 'The Ontario Seed Co.' . . . If we get a little more time, and things are allowed to develop, we will be able to pay everything in full."

This note was made by the defendant company, signed also by the two old partners, dated the 26th August, for \$1,621.90, payable three months after date.

The plaintiffs answered by letter of the 30th August: "This note does not meet with the stipulations as regards indorsements made in ours of 3rd August. We stated indorsement should be by board of directors personally, and not one or two of them. Our position is just this: we hold the liability for this amount against the original company through orders which were received from them, and against the new company through its taking over the business of the old company . . . We return note," *i.e.*, for purpose of being indorsed.

The defendant company answered by letter of the 7th September, 1909, expressing regret that the note was not satisfactory, and suggest a personal interview, and express anxiety to have the matter adjusted to the plaintiffs' satisfaction.

This ends the amicable correspondence, and the only other letter put in is one of the 23rd September, 1909, by the defendant company to the plaintiffs, *à propos* of a lawyer's visit, in which it is said that they were trying their best to fulfil the agreement with the members of the former seed company to supply them with funds to pay off their liabilities to the creditors of the old concern—"We wrote you that we anticipated to make part payment on account to the Ontario Seed Co. the end of this month." This last letter is written after taking legal advice evidently, for it puts a complete change on the attitude of the defendants. Now they propose to pay to the old seed company—formerly the offer was to pay direct to the creditors. This was the legal obligation upon the instruments of transfer and of incorporation, that the liabilities were to be assumed and paid by the new company. True, this *per se* would not give a direct right of action as between the plaintiffs and the new concern, for want of privity, but the acts and correspondence of the creditors and the assignee of the original debtor shew, so to speak, an attornment as between them, by which the plaintiffs were treated as the direct creditors of the new concern, and the new concern negotiated

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with the plaintiffs for extension of time and undertook absolutely to make payment. The giving of the promissory notes is sufficient evidence of the direct relationship of debtor and creditor to give a direct right of action. Even if it be treated as a dealing by one to answer for the debt of another, there is plenty of evidence in writing of such a promise as would satisfy the Statute of Frauds—which, however, is not pleaded. The merits are entirely with the plaintiffs—the line of defence is a technical one, and manifestly only to gain time. The facts of this case and the direct dealings between the plaintiffs and the company defendants remove this litigation from the authority of *Osborne v. Henderson*, 18 S.C.R. 698. There is here in the correspondence a direct promise of the new company to pay the old debt which they had assumed.

The judgment may also be supported as against the company on the ground that notice was given of the incorporation of the company and the taking over of the old assets and the assumption of the old liabilities, and in effect the assent of these creditors asked to the change. The plaintiffs do in effect accede to that change, and by their conduct shew that the new liability is accepted, and both parties proceed with the correspondence, and the debtor in effect gets some extension of time—from April till October, when the action is brought. The plaintiffs' letter of the 30th August indicates that, as they were advised by the American lawyer, they could look to both; but the previous dealings afford sufficient evidence to justify a conclusion that they had already elected to look to and exclusively deal with the new concern. See *Scarf v. Jardine*, 7 App. Cas. 345, at p. 351, and *Rolfe v. Flower*, L.R. 1 P.C. 27, in which Lord Eldon is quoted as saying a very little will do to make out an assent by the creditor to the agreement: p. 44. See also *Clark v. Howard*, 150 N.Y. 232.

Notwithstanding what is said by one of the Judges in *Osborne v. Henderson*,* I think the assets of the old concern were in this case fixed with a liability to pay the old creditors, so that the agreement between the old partners and the new company could not have been rescinded. The arrangement for a transfer of the whole

* In this case the judgment of the Supreme Court of Canada is briefly noted in 18 S.C.R. 698; the opinion of Patterson, J., in that Court is printed in full in 11 C.L.T.Occ.N. 88. The judgments below are reported, *sub nom.* *Henderson v. Killey* (1887), 14 O.R. 137, (1889), 17 A.R. 456.

business and assets, together with the burden of its liabilities, was the basis on which the new concern received its letters of incorporation; it was announced to the public in the prospectus filed in the office of the Provincial Secretary, and it was expressly communicated to these particular creditors, who gave their assent to the transfer of the business on those terms. No longer did they look to the old partners, who became members of the new company, but they relied upon the transfer of assets, which supplied the fund out of which they were to be paid, and upon the express promise of the defendants the company to make payment of the claim.

I think the judgment should be affirmed with costs. Unusual difficulty has been had in dealing with this appeal, because the reasons of the learned Chief Justice were given orally, and we have no clear account of the way in which he disposed of the case.

LATCHFORD, J.:—I agree.

MAGEE, J.:—I am glad that the majority of the Court has been able to come to the conclusion that this appeal should not succeed. For myself, the difficulty is that the plaintiffs have never up to the moment of issuing the writ in this action abandoned their claim against the original debtors, and on the contrary made them defendants in this action in the writ of summons, though they have since thought proper not to proceed against them, and only to ask judgment against the new company. Throughout the correspondence the plaintiffs maintained the attitude of holding the old partnership liable, and not merely of asking that the partners with the other directors should become liable as a condition of giving time to the new company. There was no consideration moving from the plaintiffs as a consideration for any promise by the new company.

Then on the documents, or indeed on the facts, I cannot see that they have become trustees of moneys or property for the plaintiffs so as to make them liable within the authorities. The letters patent make no reference whatever to the transaction, and the whole matter appears to me to rest in contract between them and the original debtors, their assignors.

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[DIVISIONAL COURT.]

YOUNG V. MILNE.

Contract—Statute of Frauds—Payment of Part of Execution Debt—Withdrawal of Execution—Promise of Stranger to Pay Balance—Evidence.

The plaintiff had issued execution against L. and had placed the writ in the sheriff's hands, but, before any action was taken upon it, the defendant came to the solicitor of the plaintiff and offered, as the solicitor said, to pay \$250 on account of the judgment, and to pay the balance in four months, provided the execution was withdrawn. The plaintiff accepted the \$250, which was paid by a cheque of L., and withdrew the execution. The defendant had no interest in the transaction except as a friend of L.; he denied having undertaken to pay anything himself; and the promise alleged by the solicitor was not in writing:—

Held, that, even accepting the solicitor's version, the promise was to pay the debt of another, and was not enforceable because it did not satisfy the Statute of Frauds; but, on the evidence, the proper conclusion was that the promise had not been made.

Beattie v. Dinnick (1896), 27 O.R. 285, *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K.B. 778, and *Bailey v. Gillies* (1902), 4 O.L.R. 182, followed.

Judgment of the District Court of Nipissing reversed.

APPEAL by the defendant from the judgment of the District Court of Nipissing in favour of the plaintiff in an action on an alleged promise in the nature of a guaranty on the part of the defendant to pay the amount of the plaintiff's judgment against the Charles B. Lentz Lumber Co., if the plaintiff would withdraw his execution against that company from the sheriff's hands. The execution was withdrawn, the plaintiff was paid \$250 by a cheque of the company, and in this action sought to recover the balance. The facts are more fully stated in the judgment.

February 8. The appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ.

H. E. Rose, K.C., for the defendant. The promise made by the defendant to the plaintiff, if any, was given in consideration of a forbearance for a time only, and no direct benefit from it came to the defendant. It was a promise to answer for the debt of another, and is therefore within the 4th section of the Statute of Frauds: *Beattie v. Dinnick* (1896), 27 O.R. 285; *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K.B. 778.

G. H. Kilmer, K.C., for the plaintiff. This was not merely a stay of execution by the plaintiff, but an abandonment of the same in consideration of the defendant's promise to pay. Therefore, the promise here does not come within the 4th section of the Statute of Frauds.

Rose, in reply. There was no intention that the debt should be abandoned.

February 21. The judgment of the Court was delivered by *BORD, C.*:—We are in the dark as to why judgment was entered for the plaintiff—no reasons being given by the learned Judge.

The facts are that the plaintiff had issued execution against the *Lentz* company, and had sent the writ to the sheriff, but, before any action was taken upon it, one *Milne*, the defendant, came to the solicitor of *Young* and offered (as the solicitor says in his evidence) to pay \$250 cash on account of the judgment, and to pay the balance in four months, provided the execution was withdrawn. The solicitor communicated with the plaintiff, and accepted the \$250, and withdrew the execution. The \$250 was in the shape of a cheque for the amount made by the *Lentz* company. *Milne* had no interest of any kind in the transaction except as a business friend of *Lentz*. He denies having undertaken to pay anything himself, and says that there was doubt whether anything could be made under the execution—though it might have produced embarrassment to the *Lentz* company, who were in financial difficulties, but who thought, if forbearance was exercised, they would be able to pull through and meet their obligations in full. Looking at all the evidence, it is the better view that little could have been realised by compulsory process—the tangible goods were far removed from *Sudbury* in the lumbering region, and only a portion in that jurisdiction. It is reasonable to believe that \$250 in hand was a better proposition than taking the risks and chances of making seizure upon chattels covered by liens and sharing with other creditors.

Milne says—and he is credited by the solicitor as being a man entitled to respect—that he made no such promise as is relied upon; that he was asked if he would guarantee the balance, and he refused. The solicitor will not deny that he asked *Milne* for a guaranty.

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The confusion of evidence and of recollection exemplifies the value of the rule of law which requires that the promise to pay the debt of another should be manifested in writing. The sole question is, does this promise, even giving credit to the solicitor's version, fall within the Statute of Frauds, which is pleaded. The authorities are, according to the latest exposition, in favour of the defendant. When the plaintiff, in consideration of the promise to pay, has relinquished an execution under which some advantage or security exists or is likely to be realised, and when the effect of relinquishment is that such interest or advantage accrues to the defendant who has made the promise, then no writing is required, for the transaction is substantially one for the purchase of the execution. But, if the promise is given in consideration of forbearance for a time, and the execution is, as here, withdrawn, yet, as no direct benefit therefrom has arisen to or was contemplated by the promisor, it is simply a promise to pay the debt of another, which is valid enough so far as the consideration is concerned, but is not enforceable because not put into writing. These conclusions are based upon the late cases of *Beattie v. Dinnick*, 27 O.R. 285; *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K.B. 778; and *Bailey v. Gillies* (1902), 4 O.L.R. 182, 190. Of the older cases, see *Tomlinson v. Gell* (1837), 6 A. & E. 564, 571, judgment of Patteson, J.; and *Chater v. Beckett* (1797), 7 T.R. 201.

The execution against the Lentz company is still outstanding and enforceable, and that company are liable for this judgment debt.

Upon all the facts, I should conclude that the transaction was rather as put by Milne than as by the solicitor. All the circumstances indicate that it was far from the intention of a stranger, Milne, to shoulder personally the liability in any event.

The judgment should be set aside and the action dismissed with costs.

[DIVISIONAL COURT.]

DICKS v. SUN LIFE ASSURANCE CO.

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Life Insurance—Will—Appointment of Trustee to Receive Moneys for Infant Children—Payment to Trustee—Discharge of Insurers—Inconsistent Duties of Trustee—Breach of Trust—R.S.O. 1887, ch. 136, sec. 11.

The testatrix by her will appointed her husband executor thereof and also trustee to receive all moneys payable under policies on her life, describing them, and including two issued by the defendants, all of which she declared to be for the benefit of her children. She devised and bequeathed to her husband all her real and personal estate, and directed that such estate, including all moneys accruing from the policies of life insurance, was to be held by her husband upon trust, first to pay her debts and funeral and testamentary expenses, and second to invest and apply the income for the benefit of the children and divide the corpus among them when the youngest should attain majority, etc. The defendants paid the amounts of their two policies (which on their face were payable to the children) to the husband as "executor of will, trustee of minor children, and administrator of estate" of the testatrix. By the statute then in force, R.S.O. 1887, ch. 136, sec. 11, the insured may by will appoint a trustee of the money payable under a policy, and payment made to such trustee shall discharge the insurers:—

Held, that there was no breach of trust in making payment to the private trustee named in the will, who was also a statutory trustee to give a discharge, and the defendants could not be regarded as participants in any breach of trust afterwards committed by the husband; and this notwithstanding the inconsistency of the duties imposed upon the husband, the will directing that payment of debts should be made in part out of these insurance moneys, while the statute exempted them from the payment of debts.

Scott v. Scott (1890), 20 O.R. 313, distinguished.

Campbell v. Dunn (1892), 22 O.R. 98, *Dodds v. Ancient Order of United Workmen* (1894), 25 O.R. 570, and *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, 153, followed.

Judgment of MACMAHON, J., affirmed.

ACTION to recover moneys alleged to be due to the plaintiffs by the defendants under two policies of insurance issued by the defendants upon the life of May Dicks, deceased. The facts are stated in the judgments.

November 1 and 2, 1909. The action was tried before MACMAHON, J., without a jury, at Toronto.

A. J. Russell Snow, K.C., for the plaintiffs.

W. Mulock, for the defendants.

November 17. MACMAHON, J.:—The plaintiffs are all the children of the late May Dicks, deceased, who died on the 2nd

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March, 1895. The plaintiff Arthur Edmund Dicks was twenty-six years of age on the 17th November, 1909; the plaintiff Ferdinand Dicks was twenty-three years old in November, 1909; Edith Dicks will be twenty-five years old in 1909; and Mary Dicks and Geoffrey Dicks are infants.

The said May Dicks, deceased, insured her life by two several policies issued by the defendants under their seal, by the terms of which said several policies they became payable on her death. And by both the policies the amounts insured thereby became payable to her "children surviving at her death share and share alike."

May Dicks made her last will bearing date the 10th December, 1894, and probate thereof was issued by the Surrogate Court of the County of York on the 12th March, 1895, to Arthur Alfred Dicks, the husband of the testatrix, and the executor therein named.

The portions of the said will necessary to be considered are as follows:—

"I appoint my husband, Arthur Alfred Dicks, executor and administrator of this my will, and devise and bequeath to my said husband all my estate, real and personal, of whatsoever nature and kind and wheresoever situate, and I appoint my said husband trustee to receive all moneys payable under the following policies of insurance on my life, all of which I declare to be for the benefit of my children."

Then follows a list of the policies of insurance in different companies, including the two policies on which this action is founded.

"The said real and personal estate, including all moneys accruing from the said policies of life insurance or any policies which may hereafter be taken, are to be held by my said husband on the following trusts:—

"*First*, to pay my just debts and funeral and testamentary expenses.

"*Second*, to invest the proceeds thereof in securities of the Dominion of Canada or Province of Ontario or in mortgages on real estate, or stocks of chartered banks or building societies or loan companies, and to apply the annual income arising therefrom in the support of our children, and, should my husband deem it

necessary and advisable, he shall be at liberty to apply the corpus of my estate for the education, maintenance, and advancement of the said children, or any of them, and as soon as the youngest of my children shall have attained the age of twenty-one years my said husband shall divide the said sum, or so much thereof as may then remain, in equal shares, *per stirpes et non per capita*, amongst my children surviving or the issue of any child or children deceased.

"And in the case all our children die before attaining the age of twenty-one years, and without leaving any issue them surviving, the said sum, or so much thereof as may then be remaining, shall then be my husband's absolutely, but in case all our children die before attaining twenty-one years, and some or all of them leave issue, the said issue shall inherit in equal shares the said sum, or so much thereof as may be remaining."

On the 18th December, 1895, the defendants paid the amount of the said two policies and interest, being \$10,220.27, to Arthur A. Dicks, and he, by a receipt under seal, and at the same time, delivered the said policies to the defendant company. Following his signature to the receipt, Arthur A. Dicks describes himself as "Executor of will, trustee of minor children, and administrator of estate of the late May Dicks."

In its main features the present case is not distinguishable from *Campbell v. Dunn* (1892), 22 O.R. 98. In that case the testatrix insured her life under two policies of insurance, and made the policies payable to her two daughters, and by her will will requested her executors, the defendants, to place the amounts thereof in some thoroughly safe investment until her daughters' majority or marriage, when the amounts and their accumulated interest should be equally divided between her daughters, and appointed her husband, the plaintiff, their guardian. In an action brought by the guardian to have the proceeds of the policies handed over to him by the executors, it was held that the insurance moneys, being made payable to the daughters, were, by 53 Vict. ch. 39, sec. 4 (O.), severed from her estate at her death, and her testamentary directions could not affect the fund beyond what was permitted by that statute and R.S.O. 1887, ch. 136; that during the minority of the daughters the trustees appointed by the will, as provided for by sec. 11 of ch. 136, might, by sec. 13, invest in manner authorised by the will; but, while the insured

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could give directions as to the investment, she was not to control the discretion of the lawful custodian of the fund and child, in case the income was needed for maintenance or education, or the corpus for advancement; and, while the guardian was the custodian of the daughters, with the incident of determining to a large extent what should be expended in their bringing up, that the executors had charge of the preservation and utilisation of the fund; and that the fund should not be transferred from the executors to the father as testamentary guardian, as his right to handle any part of the fund was subject to the trusts specified in the will, the execution of which was vested in the executors.

The statutes referred to in the above judgment of the Chancellor were in force when the policies on the life of May Dicks were effected, and when her will was executed.

Arthur A. Dicks, the husband of May Dicks, is the executor and trustee of his wife's estate, and the moneys payable on the death of the insured were, under her will, lawfully paid to Arthur A. Dicks, and, on the death of May Dicks, became severed from her estate, and were in no way affected by any direction in the will inconsistent with the rights of the daughters who were the beneficiaries under the policies.

Having reached the conclusion that the moneys due on the policies of insurance on the life of May Dicks were validly paid to the executor named in her will, I have not considered the question arising on the Statute of Limitations.

There will be judgment for the defendants dismissing the action, with costs, if exacted.

The plaintiffs appealed from this judgment.

February 9, 1910. The appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ.

A. J. Russell Snow, K.C., for the plaintiffs. The payment of the insurance moneys to the husband did not discharge the defendants. The husband was not a competent trustee, because he was a trustee not only of the insurance moneys, but for the whole estate in bulk. He is directed by the will to pay in part debts out of insurance moneys, which he has no legal right to do: *Scott v. Scott* (1890), 20 O.R. 313. His appointment as trustee must

be by a separate instrument: R.S.O. 1887, ch. 136, secs. 7, 10, 11, 12; 53 Vict. ch. 39 (O.) The fusion of funds in the will is repugnant to the rule laid down in *Scott v. Scott*. See *Racher v. Pew* (1899), 30 O.R. 483. There is a repugnance between the trusts in the will and those in the statute. As the husband was not a competent trustee, the defendants are not discharged, and must now pay over the money: R.S.O. 1887, ch. 136, secs. 14 and 15; Words and Phrases Judicially Defined, vol. 2, p. 1358; Lewin's Law of Trusts, 10th ed., pp. 388, 394; *Re Dicks* (1909), 18 O.L.R. 657; *Re Grant* (1895), 26 O.R. 120.

G. F. Shepley, K.C., and *W. Mulock*, for the defendants: The testatrix appointed her husband trustee, and he was absolutely entitled to receive the insurance moneys. The fact of his being directed by the will to do something which he must not do, does not make him incompetent. Section 12 of R.S.O. 1887, ch. 136, operates only if there is no trustee under sec. 11. There was no breach of trust in making payment to the trustee named in the will, who was also a statutory trustee to give a discharge. In *Scott v. Scott* there was no appointment of an executor as a trustee for receiving the moneys, as there is here. See *Campbell v. Dunn*, 22 O.R. 98; *Dodds v. Ancient Order of United Workmen* (1894), 25 O.R. 570. As an alternative point, the defendants say that the plaintiffs' claim is barred by the provisions of R.S.O. 1897, ch. 203, sec. 148, sub-sec. 2, and the amendments, 1 Edw. VII. ch. 21, sec. 2, sub-sec. 3, and 3 Edw. VII. ch. 15, sec. 5, limiting the time within which actions may be brought against insurers.

Snow, in reply. The provisions of sec. 148 of R.S.O. 1897, ch. 203, do not apply here. The statute is an enabling one, and the provision is for the protection of the public.

February 21. The judgment of the Court was delivered by BORD, C.:—The defendants paid the insurance money after the death to the husband, who was, by the will of the deceased, his wife, appointed to receive all moneys under the policies of insurance for the benefit of her children. The policies in question are specifically set forth in the will. By the statute then in force, R.S.O. 1887, ch. 136, sec. 11, the insured may by will appoint a trustee of the money payable under the policy, and it is declared that payment made to such trustee shall discharge the company.

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I see no escape from the plain terms of the enactment, that the company, by so paying, have been discharged, and are not liable because the money is not now forthcoming when the children are of age. There was no breach of trust in making payment to the private trustee named in the will, who was also a statutory trustee to give a discharge. The breach of trust may have arisen afterwards through the dissipation of the principal by the husband, but of this the company had no notice when they made the payment, and they could have no foreknowledge of it. The company cannot be regarded, therefore, as participants in any breach of trust.

No cases are against this conclusion. True, there is some language in a judgment of my own which, read apart from the subject-matter of decision, may be taken as saying that a trustee appointed by the insured by will was not a competent trustee, if he had also other trusts devolved upon him antagonistic to or inconsistent with those to be exercised in regard to the beneficiary insurance moneys. That inconsistency does, to some extent, exist in the present will, so that, if the trustee had done with the money as directed, he would have violated the direction of the statute. I refer to the clause which directs the payment of debts to be made in part out of these insurance moneys, which the statute exempts from the payment of the testator's debts. But I must take it that the testatrix knew this, and acted with an intention to trust her husband to do what was right with the insurance money, and that it should be paid into his hands on her death.

The case I refer to of *Scott v. Scott*, 20 O.R. 313, was one in which the money was in the hands of the Court, and the question was to whom of two claimants the fund should go, the executors of the will or the Surrogate Court guardian, and the latter was chosen, to avoid the confusion which would arise if the former was preferred. It was entirely a matter for the discretion of the Court; and did not involve the neat question now presented for decision.

Campbell v. Dunn, 22 O.R. 98, was a case of the same kind, in which the rival claimants submitted their contentions to be disposed of by the Court.

In *Dodds v. Ancient Order of United Workmen*, 25 O.R. 570, the insurance money was directed to be paid to the executors,

no trustee or guardian being appointed, and that because of "the express enactment of the legislature, which, being plain and unequivocal, had simply to be followed" (language which applies to this case).

The case of *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, 153, goes to shew that the duty of the insurance company was satisfied and discharged when they paid the money to the trustee designated by the insured, and that they had nothing to do with the application of the money after they had paid it. The terms of the contract made between them and the insured were thus satisfied by the due payment to her nominee.

The appeal should be dismissed and judgment affirmed without costs. This because the trial Judge might well have given no costs on account of the prior case referred to.

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Charge on Land—Mortgage Paid by Tenant for Life—Absence of Evidence to Shew Intention to Exonerate Fee—Discharge of Mortgage—Registration—Preservation of Charge—Statute of Limitations—Duty to Keep down Interest—Payment to Save Bar—Will—Second Life Estate—Intervening Period—Receipt of Rents and Profits—Election—Permissive Waste—Voluntary Waste.

The testator, dying in 1877, devised mortgaged land to his son in fee, subject to a life estate to the plaintiff, his wife, defeasible on the son's attaining majority. The will directed that the plaintiff should have the sole control of the testator's farm, which consisted of the mortgaged land and of an adjoining lot, during the continuance of her life interest, and she was the residuary devisee of all the testator's real and personal property. The will contained no direction as to payment of debts and no reference to the mortgage. After her husband's death, the plaintiff, who lived on the mortgaged land with her family, or rented it, paid off the mortgage by a number of payments, out of her own moneys, and in 1888 obtained a discharge of the mortgage, which she retained in her own possession. The son became of age in 1892, and died in 1900, having by his will devised the land to the plaintiff, "to be used by her as she might deem fit during her lifetime," with remainder to his four sisters in fee. He knew that the plaintiff had paid off the mortgage. From the time the son became of age until his death, the plaintiff remained in possession of the land, receiving the rents and profits as before, and the son and unmarried daughters lived with her. On the 5th December, 1903, the plaintiff registered the discharge of the mortgage. Up to the time this action was brought (the 30th September, 1909), she made no claim for repayment of the moneys paid by her; and there was no evidence of any expressed intention on her part to pay the mortgage off for her own benefit or for the benefit of those entitled in remainder:—

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Held, that the plaintiff was entitled to treat the principal money paid by her in discharge of the mortgage as a subsisting charge in her favour upon the mortgaged lands; and her right was not affected by the taking or registration of the discharge.

Held, also, that the plaintiff's claim to a lien or charge for the moneys paid was not barred by the Statute of Limitations. When the son became of age and the plaintiff's first life estate came to an end, the statute began to run, and continued to do so until the death of the son. But the plaintiff's new life estate then came into existence, and with it the right to the rents and profits and the corresponding obligation to keep down, out of them, the interest on the still existing charge. The result of payment of the interest in this way was that the statute was not a bar.

Burrell v. Earl of Egremont (1844), 7 Beav. 205, followed.

Held, also, that the plaintiff was not bound to elect between the retention of the charge and the acceptance of the life estate under her son's will.

Held, also, that the plaintiff was chargeable with whatever she received during the eight years which elapsed between the termination of the first life estate and the commencement of the second, over and above what was paid on account of the household expenditure.

Held, also, that, as no express duty to repair was imposed by the will, the plaintiff was not impeachable for permissive waste.

Patterson v. Central Canada Loan and Savings Co. (1898), 29 O.R. 134, followed.

Morris v. Cairncross (1907), 14 O.L.R. 544, specially referred to.

Held, however, that the plaintiff was liable for voluntary waste, having cut and sold timber and cordwood, not in the ordinary process of clearing the land; the terms of the son's devise not being large enough to authorise what she did.

Pardoe v. Pardoe (1900), 16 Times L.R. 373, followed.

THIS was an action for a declaration that the plaintiff, the widow of John Currie senior, deceased, was entitled to a lien or charge on certain land for moneys paid by her in satisfaction of a mortgage made by him thereon, and for sale of the land in default of payment, and for other relief.

The defendants were respectively the surviving children and grandchildren of the deceased Currie, who were entitled to the land in remainder under the will of a deceased son after the determination of the plaintiff's life estate therein under the same will.

The claim was resisted on the grounds that the mortgage was paid in exoneration of the fee; that the plaintiff had been guilty of voluntary and permissive waste in respect of the land to an amount more than sufficient to answer any charge or lien she might be entitled to; and that her claim was barred by the Statute of Limitations. The defendants also counterclaimed for damages for waste in permitting the buildings and fences on the land to become ruinous and out of repair and the land to become depreciated in value for want of proper cultivation, and for waste in cutting and selling timber and firewood off the land.

It appeared that the deceased John Currie senior mortgaged

the land in fee to one McDiarmid in 1876, to secure the sum of \$760, payable in three instalments of principal and interest, the last of which became due on the 25th February, 1880. He died on the 15th March, 1877, and by his will (proved on the 12th January, 1878) devised the mortgaged land to his son John Currie junior in fee, subject to a life estate therein to the plaintiff, defensible on the son's attaining the age of twenty-one years. The will directed that the plaintiff should have the whole and sole control of the testator's farm, which consisted of the mortgaged land and of an adjoining lot, which he devised to other sons, also subject to a life estate in favour of the plaintiff, during the continuance of her life interest, and she was the residuary devisee of all the testator's real and personal property. The will contained no direction as to payment of debts, nor any reference to the mortgage.

After her husband's death, the plaintiff, who lived on the mortgaged land with her family, or rented it when she was not living there, paid off the mortgage by a number of payments commencing on the 31st March, 1877, and ending on the 12th January, 1888. These payments were made out of her own moneys; and on the 31st January, 1888, she obtained from the executors of the mortgagee a discharge of mortgage, in the usual form, which she retained in her own possession.

John Currie junior became of age on the 18th December, 1892. He died on the 8th December, 1900, having by his will devised the land to the plaintiff, "to be used by her as she might deem fit during her lifetime," with remainder to his four sisters in fee. He knew that the plaintiff had paid off the mortgage.

From the time John Currie junior became of age until his death, the plaintiff remained in possession of the land, receiving the rents and profits as before, and John and the unmarried daughters lived with her.

On the 5th December, 1903, the plaintiff caused the discharge of mortgage to be registered, upon the advice, it was said, of a solicitor who told her that it ought to be done.

In October, 1908, she endeavoured, without success, to obtain from her surviving daughters and grandchildren a release of their interest in remainder, and, after proposals for a sale of the land

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and investment of the proceeds for the benefit of all parties had failed, this action was brought on the 30th September, 1909, up to which time there did not appear to have been any claim for repayment of the moneys paid by her, nor was there evidence either way of any expressed intention of the plaintiff in paying off the mortgage, that is to say, whether she was paying it off for her own benefit or for the benefit of those entitled in remainder. She paid it off because it was overdue, and the executors of the mortgagee were threatening to sell.

December 6, 1909. The action was tried by OSLER, J.A., without a jury, at Barrie.

A. E. H. Creswicke, K.C., for the plaintiff.

W. H. Irving and W. E. S. Knowles, for the defendants.

February 24. OSLER, J.A. (after setting out the facts as above):—Under the circumstances disclosed by the evidence, the plaintiff was, I have no doubt, entitled to treat the principal money paid by her in discharge of the mortgage as a subsisting charge in her favour upon the mortgaged lands. Of her right to do so she was ignorant until she was advised of it before the action was brought.

“If a tenant for life pays off a charge on the inheritance, he is, *primâ facie*, entitled to that charge for his own benefit; but he may, if he think proper, exonerate the estate. In the absence of evidence, the presumption is, that he pays the charge for his own benefit, and not for the benefit of the persons entitled in remainder. . . . A tenant for life paying off a charge upon the estate, in the same transaction merging the security, by taking an assignment, connecting it with the legal estate of inheritance, *primâ facie* puts an end to the charge; but something is required to manifest an intention to exonerate the inheritance. A simple payment of the charge, without more, is sufficient to establish the right of the tenant for life to have the charge raised out of the estate. He has no obligation or duty to make a declaration, or to do any act demonstrating his intention. The burden of proof is upon those who allege that, in paying off the charge, he intended to exonerate the estate.” *Burrell v. Earl of Egremont* (1844), 7 Beav. 205, 226, 232. “The principle,” as Spragge, V.-C.,

says in *Macklem v. Cummings* (1859), 7 Gr. 318, 321, "is indeed too well settled to admit of dispute; the only difficulty lies in its application."

In this case the facts are simple, and no difficulty on this point arises. The plaintiff's right is not affected by the taking or the registration of the discharge. It is no more than if she had taken a release of the mortgage, or a conveyance of the original estate of the mortgager: *Burrell v. Earl of Egremont*, *supra*; *Lord Gifford v. Lord Fitzhardinge*, [1899] 2 Ch. 32. There is no evidence that when she caused the discharge to be registered she intended to abandon her rights, and I am satisfied that she was not then advised of them.

The plaintiff is, therefore, in my opinion, entitled to relief, unless her claim is defeated by one or other of the various defences pleaded thereto.

And, first, as to the Statute of Limitations. "Where the tenant for life of land is himself the owner of a charge upon it, since it is his duty to keep down the interest, he is deemed to pay himself out of the rents and profits, and this is a sufficient payment to save the bar of the statute:" *Lightwood on the Time-limit on Actions* (1909), p. 361, citing *Burrell v. Earl of Egremont*, *supra*; *Topham v. Booth* (1887), 35 Ch. D. 607, 611; and other cases; and see *Fisher on the Law of Mortgage*, 5th ed. (1897), par. 795; *Darby & Bosanquet on Limitations*, 2nd ed. (1893), pp. 464, 465.

The peculiarity of this case arises out of the coming into existence of the plaintiff's second life estate under the will of her son John Currie junior. From March, 1888, until the 18th December, 1892, when that son became of age, the statute (now R.S.O. 1897, ch. 133, sec. 23) was not running, the plaintiff being tenant for life under her husband's will, paying and receiving the interest on the charge out of the rents and profits of the land. When that life estate came to an end on the date last mentioned, her right to possession and receipt of the rents and profits ceased, and the statute began to run, and continued to do so until the death of the son on the 8th December, 1900. But the plaintiff's new life estate then came into existence, and with it the right to the rents and profits and the corresponding obligation to keep down, out of them, the interest on the still existing charge, or so much

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thereof as might be due after charging the plaintiff with whatever sum she ought to be charged with in respect of her receipts during the eight years which elapsed between the termination of the first life estate and the commencement of the second. The result of payment of the interest in this way is, in my opinion, in accordance with the authorities above cited, that the statute is not a bar.

It was contended that the plaintiff was bound to elect between the retention of the charge and the acceptance of the life estate under her son's will, and that the registration of the discharge was evidence that she had elected against the former. I am not aware of any principle on which she was bound to elect, and, in the absence of any evidence from which to infer any agreement on this subject between herself and her son, I hold that she was not put to her election, the mere acceptance of the life estate not being inconsistent with the existence of the charge, and there being no evidence that the discharge of the mortgage was registered in consequence of an intention on her part to abandon it.

There remain the questions as to the plaintiff's receipts during the eight years referred to, and whether she is chargeable in respect of waste. There is no very satisfactory evidence as to the former. I gather that her son John was an invalid, and that they lived together with one or more of the unmarried daughters, and that the plaintiff managed the property for John, and received the rents when it was rented, as she had formerly done. This she, no doubt, did with John's assent, but how much she actually received has not been established. She is chargeable with whatever she did receive over and above what may have been paid on account of the household expenditure (which, under the circumstances, must be held to have been authorised), or otherwise on John's account, and interest at six per cent. on the amount of the charge, \$760. If the defendants think it worth while to take a reference on this point, they may do so; otherwise I am disposed to hold that the one should be set off against the other.

Then, as to waste. In respect of permissive waste, no express duty to repair being imposed by the will, I conceive that, sitting as trial Judge, I am bound by the decision of a Divisional Court in *Patterson v. Central Canada Loan and Savings Co.* (1898), 29 O.R. 134, following *In re Cartwright* (1889), 41 Ch. D. 532, to

hold that a tenant for life is not impeachable for waste of that description. See, however, *Morris v. Cairncross* (1907), 14 O.L.R. 544, where the whole subject is learnedly discussed by Meredith, C.J., in delivering the judgment of a Divisional Court, though this particular point is left open.

As to voluntary waste, the plaintiff appears to have cut and sold a considerable quantity of timber and cordwood, not in the ordinary process of clearing the land; and with the value of this, which I fix at \$250, she must be charged. It was urged that the terms of the son's devise were large enough to authorise what she did, but I do not think so. They are not substantially larger than the words of the will in *Pardoe v. Pardoe* (1900), 16 Times L.R. 373—"full and absolute control of all the property during his life"—which were held not to authorise the tenant to commit waste by cutting timber and applying the proceeds to his own use.

The plaintiff will, therefore, have judgment declaring her entitled to a lien on the land for \$510, or so much less as may be found due to her upon the reference, if the defendants desire a reference, and to sale in default of payment.

Further directions and costs reserved.

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[DIVISIONAL COURT.]

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Jan. 21.

Mar 3.

Liquor License Act—Conviction for Second Offence—Amendment of sec. 72 after First Conviction—Change in Penalty—Interpretation Act, sec. 7, clause 46 (d)—Refusal of Judge to Discharge Prisoner—Right of Appeal to Divisional Court—Proof of Previous Conviction—Statutory Procedure—Violation by Magistrate—Liquor License Act, sec. 101.

Notwithstanding the provisions of secs. 1 and 6 of R.S.O. 1897, ch. 83, and of the Liquor License Act, R.S.O. 1897, ch. 245, sec. 121, there is a right of appeal to a Divisional Court of the High Court from an order of a Judge of the High Court, made on the return of a *habeas corpus* and *certiorari* in aid, refusing to discharge a prisoner confined under a conviction as for a second offence of selling liquor without a license, contrary to the Liquor License Act.

The prisoner was first convicted on the 28th July, 1908. In 1909, by sec. 12 of 9 Edw. VII. ch. 82, sec. 72 of the Liquor License Act was amended by increasing the penalty for a first offence. The conviction for the second offence was made after the amendment:—

Held, by CLUTE, J., and by a Divisional Court on appeal, that, having regard to the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, clause 46 (d), the offence for which the prisoner was convicted was a second offence within the statute, notwithstanding the amendment.

But held, by the Divisional Court, that the convicting magistrate, in inquiring as to the previous conviction, had not followed the procedure indicated by sec. 101 of the Liquor License Act; and the prisoner must be discharged.

APPLICATION by the defendant, upon the return of writs of *habeas corpus* and *certiorari* in aid, for his discharge from imprisonment under a commitment pursuant to a conviction for a second offence against the Ontario Liquor License Act. The facts are stated in the judgments.

January 18. The application was heard by CLUTE, J., in Chambers.

J. B. Mackenzie, for the defendant.

E. Bayly, K.C., for the Crown.

January 21. CLUTE, J.:—The defendant is imprisoned for a second offence under the Liquor License Act; and the contention is, that, an amendment having been made in the section by increasing the penalty for the first offence, there can not be a second offence under the same section of the Act, where the prior offence predated the amendment.

The prisoner was first convicted on the 28th July, 1908. On the 13th April, 1909, sec. 72 of the Act was amended by increasing

the penalty for a first offence from not less than \$50 besides costs, and not more than \$100 besides costs, to a sum of not less than \$100 besides costs, and not more than \$200 besides costs. The punishment for a second offence (which was imprisonment for four months) was not changed by the amendment.

Section 72 of R.S.O. 1897, ch. 245, under which both convictions were made, is as follows:—

“Any person who sells or barter spirituous, fermented or manufactured liquors of any kind, or intoxicating liquors of any kind, without the license therefor by law required, shall for the first offence, on conviction thereof, forfeit and pay a penalty of not less than \$50 besides costs, and not more than \$100 besides costs; and in default of payment thereof he shall be imprisoned in the county gaol of the county in which the offence was committed, for a period of not less than three months, and be kept at hard labour, in the discretion of the convicting magistrate; and for the second offence, on conviction thereof, such person shall be imprisoned in such gaol for the period of four months, to be kept at hard labour in the discretion of the convicting magistrate; and for the third or subsequent offence, on conviction thereof, such person shall be imprisoned in such gaol for the period of six months, to be kept at hard labour in the discretion of the convicting magistrate; and in the event of the imprisonment of any person upon several warrants of commitment under different convictions in pursuance of this Act, whether issued in default of distress for a penalty or otherwise, the terms of imprisonment under such warrant shall be consecutive and not concurrent.”

Section 12 of 9 Edw. VII. ch. 82 (O.) is as follows:—

Section 72 of the Liquor License Act is amended by striking out the figures “\$50” in the 5th line and inserting the figures “\$100” in lieu thereof, and by striking out the figures “\$100” in the 6th line and inserting the figures “\$200” in lieu thereof, and by striking out all the words therein after the word “magistrate” in the 10th line down to and including the word “month” in the 16th line and substituting therefor the following: “and for a second or any subsequent offence such person shall upon conviction be imprisoned for a period of four months.”

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The section was not repealed, but the figures indicating the amount of the penalty were changed. It can not be supposed that the Legislature intended by increasing the penalty to give a clear slate in all those cases where a first conviction had been made. The second offence, which calls for imprisonment, is the offence of selling liquor without a license after a previous conviction. There was a previous conviction for an offence against the Act.

Having regard to the nature of the amendment and to the intendment of the statute, as enacted by sec. 101, sub-sec. 6,* I am of opinion that the offence for which the prisoner was convicted was a second offence within the statute, notwithstanding the amendment. I am unable to give effect to the objection. See the Interpretation Act, 1907, 7 Edw. VII. ch. 2, sec. 7, clause 46 (d).†

The other points argued were disposed of against the application at the close of the argument.

The application must be dismissed.

The defendant appealed from the order of CLUTE, J.

February 14 and 15. The appeal came on for hearing before a Divisional Court composed of BRITTON, LATCHFORD, and SUTHERLAND, JJ.

E. Bayly, K.C., for the Crown, objected that no appeal lay to a Divisional Court.

J. B. Mackenzie, for the defendant. The preliminary objection was argued in *Rex v. Miller* (1909), 19 O.L.R. 125, but no

* 6. In case any person who has been convicted of a contravention of any provision of any of the sections of this Act numbered 49, 50, 51, 52, or any section for the contravention of which a penalty or punishment is prescribed by section 72 or section 86, is afterwards convicted of an offence against any provision of any of the said sections, such conviction shall be deemed a conviction for a second offence, within the meaning of section 72 or section 86, as the case may be, and may be dealt with and punished accordingly, although the two convictions may have been under different sections;

† 46. Where any Act or enactment is repealed, or where any regulation is revoked, such repeal or revocation shall not save as in this section otherwise provided,—

(d) Affect any offence committed against any Act, enactment, regulation or thing so repealed or revoked, or any penalty or forfeiture or punishment incurred in respect thereof;

decision on the point was given in that case, which was decided on other grounds. It is submitted that an appeal lies just as it does in the case of a refusal to grant a *certiorari*: *Regina v. Grant* (1889), 18 O.R. 169; *Regina v. Becker* (1891), 20 O.R. 676; *Re Martin and Garlow* (1910), *ante* 295. The case is similar also to that of a refusal to grant prohibition in a criminal case: *Regina v. Coursey* (1895), 27 O.R. 181. *Rex v. Lowery* (1907), 15 O.L.R. 182, is an authority in this very case of *habeas corpus*; or the application may be looked upon as a rehearing, jurisdiction to entertain which always pertained to the full Court: *Regina v. Fee* (1887), 13 O.R. 590. In any case the Court will hear a substantive motion for *habeas corpus*: *Regina v. Collier* (1887), 12 P.R. 316; *Regina v. Beemer* (1888), 15 O.R. 266.

As to the merits, the principal objection is that the conviction is unsustainable, having been made after the change in the statute of the present year, 9 Edw. VII. ch. 82, sec. 12 (O.), altering the punishment for the offence of selling liquor without a license and varying the law in other respects. The penalty for a first offence has been increased by the new Act, and the procedure has been altered in various respects, and it is submitted that under the present law there can be no conviction for a second offence where the first offence was committed (in June, 1908) before the Act of 9 Edw. VII. came into effect, which was on the 13th April, 1909. The Judge in Chambers founded his refusal to discharge the prisoner on the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, clause 46 (*d*), which, it is submitted, does not apply in the present case. I refer to *Jones qui tam v. Ketchum* (1853), 11 U.C.R. 52. Under the common law a subsequent offence is not punished more severely than a first offence: see Taschereau's Criminal Code, p. 699. Second offences, then, being creatures of the statute, the law regarding them, especially in cases involving the liberty of the subject, will be very strictly construed. The admission by the prisoner of the prior conviction is quite inadequate, and contains unverified interlineations, in different ink from the body of the document, of words which are of the greatest importance in connection with the case. There is nothing to shew that the second offence was committed in a locality within the jurisdiction of the magistrate. On this point I refer to *Regina v. Highmore* (1705), 2 Ld. Raym. 1220; *Rex v. Jeffries*

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(1786), 1 T.R. 241; *Rex v. Hazell* (1810), 13 East 139; *Rex v. Chandler* (1811), 14 East 267; and *Rex v. Johnson* (1719), 1 Stra. 261, which is cited with approval in *Rex v. Brisbois* (1907), 15 O.L.R. 264, at p. 266.

Bayly, K.C., for the Crown. Under sec. 121 of the Liquor License Act, taken in connection with the Habeas Corpus Act, 9 Edw. VII. ch. 51, sec. 8 (O.), no appeal lies in such a case as this except to the Court of Appeal, and then only upon a certificate being given by the Attorney-General that the case is one in which the right to appeal should be allowed. The Judicature Act does not apply to a case like this, in which there is a special Act governing the point. As to the alleged right of going from Court to Court, I cite *Taylor v. Scott* (1899), 30 O.R. 475.

As to the merits, I rely on the judgment of Clute, J., below, where it was held that it could not have been the intention of the Legislature to give a clean slate to offenders as to all offences committed before the passing of the Act of 1909. No change has been made by that Act (9 Edw. VII. ch. 82, sec. 12), as to the punishment for a second offence, and as to offences subsequent to the second the penalty is milder. I rely upon the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, clause 46 (d) and (e). As to the alleged irregularities in the proceedings before the magistrate, it may be the case that he did not follow sec. 101 of the Act in exact terms, but irregularities of the kind alleged are cured by the operation of sec. 105, which is much stronger than when *Rex v. Nurse* (1904), 7 O.L.R. 418, was decided. In *Rex v. VanZyl* (1909), 13 O.W.R. 485, the magistrate had directly contravened the statute, which is not the case here.

March 3. BRITTON, J.:—This is an appeal from the judgment of Mr. Justice Clute, rendered on the 21st January, 1910, refusing to discharge the prisoner George Teasdale from custody, he being confined in the gaol of the united counties of Northumberland and Durham, under a conviction made on the 11th December, 1909, by the police magistrate at Cobourg, as for a second offence of selling liquor without license.

On the 12th January, 1910, a writ of *habeas corpus* issued. A *certiorari* was issued in aid, and, upon the return of these, the discharge of the prisoner was asked upon very many grounds. Mr. Justice Clute did not give effect to these objections.

The notice of motion by way of appeal states as a ground, "that the police magistrate making the conviction and issuing the warrant of commitment had no jurisdiction so to make or issue the same." The notice further states that upon such motion all objections made before Mr. Justice Clute will be taken. The main objection relied upon before my brother Clute was, that no conviction for a second offence could be made because of the amendment of sec. 72 of the Liquor License Act after the alleged first conviction and before the second conviction. Upon that objection judgment was reserved, and all other objections were upon the argument disallowed. I do not know what the specific objections raised, and so disposed of on the argument, were; but, as to the one reserved, and afterwards decided, I may say that I wholly agree with the learned Judge.

The Crown took as a preliminary objection that there is no appeal:—

(1) No appeal under the Habeas Corpus Act, as here, to a Divisional Court. Although the writ of *habeas corpus* could have been made returnable before a Divisional Court or before a single Judge, in either case the appeal is only to the Court of Appeal.*

(2) No appeal because of the provisions in the Liquor License Act in regard to appeals, R.S.O. 1897, ch. 245, secs. 118, 121.

Neither Act, in terms, prevents such an appeal as is now taken, from a Judge in the ordinary course to a Divisional Court. Unless there is a prohibition in terms or by necessary implication, there is no reason why the case is not covered by Con. Rule 777.† The judgment pronounced by Mr. Justice Clute, if it stands, finally disposed of the matter.

Under the Liquor License Act (sec. 121) an appeal will lie to the Court of Appeal from a judgment of the High Court or a Judge thereof, "but no such appeal" (*i.e.*, appeal to the Court of Appeal) "shall lie from the judgment of a single Judge, or from the judgment of the Court, if the Court is unanimous, unless in either case the Attorney-General for Ontario certifies," etc. . . .

* See secs. 1 and 6 of R.S.O. 1897, ch. 83; *Re Harper* (1892), 23 O.R. 63; *Regina v. McAuley* (1887), 14 O.R. 643.

† 777.—(1) A person affected by any judgment, order or decision of a Judge in Chambers may appeal therefrom to a Divisional Court. . . .

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That seems to imply that a party may, as of right and in the ordinary case, go from a single Judge to a Divisional Court: *Rex v. Lowery*, 15 O.L.R. 182.

I am of opinion that the Divisional Court has jurisdiction, and so the objections must be considered.

Assume that the offence charged as of the 3rd November, 1909, was proved, and that the prisoner was found guilty—then, and not before, the prisoner should have been asked “whether he was previously convicted, as alleged in the information.”

The allegation in the information is that the prisoner was on the 28th day of July, 1908, at the town of Cobourg, before the police magistrate in and for the town of Cobourg, duly convicted of having on the 11th day of June, 1908, at the village of Colborne, in the county of Northumberland, unlawfully sold liquor without the license therefor by law required. The prisoner, after having been made aware of that allegation, should have been asked, in substance at least, with some regard to the requirement of the statute, whether he was previously convicted, as so alleged, or not. If, upon this inquiry being made, the prisoner had answered that he was so previously convicted, he could have been sentenced. Had the prisoner denied or had he not answered directly, proof of the previous conviction would have been required.

The record does not shew that the statutory procedure was complied with. The police magistrate says in his minute of conviction that subsequently, and on the same 11th December, 1909, the defendant pleaded guilty upon a charge of having been previously convicted on the 28th July, 1908, of having on the 11th June, 1908, at the village of Colborne, in the county of Northumberland, sold liquor without the license therefor by law required. The place of conviction is not stated, nor is the name of the convicting magistrate, although both are in the information. Then the police magistrate, no doubt acting in perfect good faith, and intending to comply with the law, puts the previous conviction in the form of a charge against the prisoner. He is charged with having been previously convicted, and to this charge it is alleged that the prisoner pleaded guilty. It could not be put in the form of a charge. It is not an offence to have been convicted of an offence. The prisoner did not convict, but was convicted—no doubt, much against his own will and wish. Putting the matter in this form is conclusive evidence to me that the police

magistrate did not in fact comply with the statute, and it may be a matter of regret that the prisoner, if in fact guilty of the previous offence and subsequent offence of selling liquor without license, should escape without the full punishment to which he was sentenced; yet that cannot be avoided. It is important that, before imprisonment, guilt should be established, and that the conviction should be in due form of law. I do not give effect to any of the many objections taken by the prisoner's counsel.

My decision is that sec. 101 of ch. 245* was not, in form or substance, complied with.

Similar cases have been dealt with by a Divisional Court.

In *Rex v. Brisbois*, 15 O.L.R. 264, the prisoner was discharged, as the evidence, while disclosing a sale on the premises, did not prove a sale by the prisoner himself. See also *Regina v. Fee*, 13 O.R. 590, which was a rehearing to quash a conviction.

An order will go for the discharge of the prisoner. No costs.

LATCHFORD, J.:—For the reasons given by my learned brother Britton, I consider that the Divisional Court has jurisdiction to entertain this appeal.

The convicting magistrate did not comply with the imperative requirement of sec. 101, and ask the prisoner, regarding the prior conviction, "whether he was so previously convicted as charged in the information." It was not, I think, open to the magistrate, upon the return of the writ, or indeed at any time subsequent to the conviction, to amend his statement made prior to the conviction of what he did ask the prisoner. But even his subsequent undated statement does not indicate that he complied with the statute. The prisoner should be discharged.

I agree that it is not a case for costs.

SUTHERLAND, J.:—I agree.

* 101. The proceedings upon any information for committing an offence against any of the provisions of this Act, in case of a previous conviction or convictions being charged, shall be as follows:

1. The justices or police magistrate shall in the first instance inquire concerning such subsequent offence only, and if the accused be found guilty thereof, he shall then, *and not before*, be asked whether he was so previously convicted, as alleged in the information, and if he answers that he was so previously convicted, he may be sentenced accordingly; but if he denies that he was so previously convicted, or stands mute of malice, or does not answer directly to such question, the justice or police magistrate shall then inquire concerning such previous conviction or convictions.

By sec. 20 of 9 Edw. VII. ch. 82, the words "and not before" are struck out.

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Mar. 7.

Railway—Collision—Injury to Person on Train—Licensee or Trespasser—Negligence—Findings of Jury—Evidence—Question not Left to Jury—Determination by Court—Consent—Judgment—New Trial.

In a collision between a van or car of the defendants and a backing train of the Pere Marquette Railway Company, the plaintiff, who was standing on the platform of one of the Pere Marquette coaches, the foremost one in the train as it moved reversely, and who was on the coach not as a paying passenger, but getting a gratuitous "lift" for a short distance, was injured. The collision was caused by the negligence of the defendants:—

Held, that the plaintiff was a licensee, and, not being wrongfully where he was, was entitled to recover damages against the defendants.

Harris v. Perry & Co., [1903] 2 K.B. 219, and *Sievert v. Brookfield* (1905), 35 S.C.R. 494, followed.

And *semble*, *per* BOYD, C., that, in the circumstances, the defendants would not be exempt from liability, though the plaintiff was nothing else than a mere trespasser.

At the trial the jury found, in answer to questions, that the plaintiff was not upon the train or platform by permission of the Pere Marquette Railway Company. The jury were not asked to find whether he was there with the permission of the trainmen in charge of the train:—

Held, that it was open to the jury to find, and they should have found, upon the direct evidence as to that occasion, that the plaintiff was there with the knowledge and consent of the man conducting the backing operations, and also, on the uncontradicted evidence, that he and others had been there on many other occasions; and this was sufficient to justify a verdict for the plaintiff.

At the trial, the parties consented to the Court determining any point necessary for the determination of the rights of the parties not covered by the questions submitted:—

Held, that the judgment for the defendants entered upon the findings of the jury should be set aside, and judgment entered for the plaintiff for the damages assessed by the jury; the necessity for a new trial being obviated by the consent.

Judgment of MEREDITH, C.J.C.P., reversed.

APPEAL by the plaintiff from the judgment of MEREDITH, C.J.C.P., after the trial of the action before him and a jury at London.

The plaintiff alleged that on the 23rd August, 1909, in the night time, he was a passenger on a train which was owned and operated by the Pere Marquette Railway Company, and when the train was moving reversely in a south-easterly direction on the main track, in the city of London, it collided with a van or car belonging to the defendants, owing to the negligence of the defendants and their servants, whereby the plaintiff lost both of his legs and sustained other injuries. The plaintiff claimed \$20,000 damages.

The defendants pleaded not guilty by statutes 16 Vict. ch. 37, sec. 2, and the Railway Act, R.S.C. 1906, ch. 37, sec. 306.

At the trial it appeared that the plaintiff at the time of the collision was upon the platform of the foremost car of the Pere Marquette train, but not as a regular paying passenger; he was there either as a mere trespasser or as a licensee by permission of the servants of the Pere Marquette Railway Company.

The following questions were submitted to the jury by the trial Judge:—

1. Was the plaintiff, at the time of the accident, upon the train of the Pere Marquette Railway Company by the permission of the company?

2. Was the plaintiff on the platform by the permission of the Pere Marquette Railway Company?

3. If you answer "Yes" to questions 1 and 2, upon what grounds do you so find?

4. At what sum do you assess the plaintiff's damages?

The jury answered "no" to the first and second questions; they did not answer the third; and they assessed the damages at \$6,000.

The trial Judge, upon his own finding of facts, and the findings of the jury, directed that judgment be entered dismissing the action without costs—the defendants not asking for costs.

February 10 and 11. The appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ.

J. F. Faulds and *P. H. Bartlett*, for the plaintiff. The defendants were guilty of gross negligence as defined in *Watson v. Northern R.W. Co. of Canada* (1864), 24 U.C.R. 98. The plaintiff should have a new trial both because wrong questions were put to the jury and improper evidence was admitted. The jury should have been asked if the plaintiff was on the platform of the Pere Marquette car by permission of the trainmen, instead of if he was there by permission of the company. The plaintiff had ridden in the same way often, to the knowledge of the trainmen, and without objection from them, and was doing so on this occasion. Evidence was improperly admitted, in that the rules and regulations of the defendants, not of the Pere Marquette Railway Company, were put in, as to persons riding on trains.

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Therefore, the question about the permission of the company should not have been allowed. No rules of the Pere Marquette company were put in. The notice on the door of the Pere Marquette car forbidding passengers to stand on the platform would have no force, as it was not proved that the printed regulations of the Pere Marquette company had been sanctioned by the Governor-General in council. See the Railway Act, R.S.C. 1906, ch. 37, sec. 307, and sec. 310, sub-sec. 3. Section 282 of the same Act debars a person injured while standing on a platform, if there is room inside, from claiming damages. But the plaintiff was not on the platform of a Grand Trunk car. If the plaintiff was a trespasser (which is denied), the defendants were also trespassers, for they ran into another company's coach. The defendants must have been in exclusive possession to maintain trespass: *Cooper v. Crabtree* (1882), 20 Ch. D. 589, 592. The defendants should have had a look-out on the front of their train to warn people: sec. 276 of the Railway Act; *Curran v. Grand Trunk R.W. Co.* (1898), 25 A.R. 407; sec. 427 of the Railway Act; *Dunkman v. Wabash St. Louis and Pacific R.W. Co.* (1888), 95 Mo. 232, 245, 246. The plaintiff was not a trespasser. When he was injured he was on a public street. See *Shearman & Redfield on the Law of Negligence*, 5th ed., p. 150, sec. 98; *Louisville N.A. and C.R. Co. v. Phillips* (1887), 13 N.E. Repr. 132; *Davis v. Chicago and N.W.R. Co.* (1883), 17 N.W. Repr. 406; *Gulf. C. and S.F.R. Co. v. Walker* (1888), 7 S.W. Repr. 831; *Townley v. Chicago M. and St. P.R. Co.* (1881), 11 N.W. Repr. 55; *Lloyd v. Albemarle and Raleigh R. Co.* (1896), 24 S.E. Repr. 805; *Grand Trunk R.W. Co. v. McKay* (1903), 34 S.C.R. 81, 87; *Am. & Eng. Encyc. of Law*, 2nd ed., vol. 23, p. 736, and cases there referred to; *Dublin Wicklow and Wexford R.W. Co. v. Slattery* (1878), 3 App. Cas. 1155; *Thompson on Negligence*, vol. 2, p. 428; *The Bernina* (1886), 12 P.D. 58, 83.

W. Nesbitt, K.C., for the defendants. The plaintiff was a trespasser, and as such the defendants owed no duty to him: *Degg v. Midland R.W. Co.* (1857), 1 H. & N. 773, at pp. 781 and 782. This is the leading case, and gives all the law, assuming the jury's findings to be correct. The rules referred to in the Railway Act as requiring the sanction of the Governor-General in council, are not such as the little rule on the door. The Grand Trunk rules

were put in probably to shew that the Pere Marquette rules were the same as those of the Grand Trunk. Any objection to the questions should have been raised at the trial. The defendants owed no duty to the plaintiff: *Spence v. Grand Trunk R.W. Co.* (1896), 27 O.R. 303; *Grand Trunk R.W. Co. v. Anderson* (1898), 28 S.C.R. 541; *Lowery v. Walker* (1909), 25 Times L.R. 608, affirmed, [1909] W.N. 249; *Alexander v. Toronto and Nipissing R.W. Co.* (1874), 35 U.C.R. 453; *Nightingale v. Union Colliery Co. of British Columbia* (1904), 35 S.C.R. 65.

Faulds, in reply. The rule on the door affects the public generally, and must be sanctioned under the Railway Act. No one can be a trespasser on the property of another unless the other has exclusive possession. The defendants were trespassers both on the Pere Marquette and on the highway. See *Encyc. of the Laws of Eng.*, vol. 12, pp. 279, 280, 281; *Cooper v. Crabtree*, 20 Ch. D. 589, 592.

March 7. The judgment of the Court was delivered by *Boyd, C.*:—Though the conductor was on the empty cars which were being backed to the junction, he was not in charge of the movement: it was in the hands of Cole, who gave the signal to switch—for the information of the Grand Trunk officials—and was at the moving end of the coach, with lantern, on the look-out. Before the backing began, the plaintiff was on the platform, which was then at the front of the backward movement, close beside Cole, to whom he spoke, and who leaned over him to see what delayed the starting after the signal had been given. From the evidence of the plaintiff and the plaintiff's wife, I would infer that what Cole says as to his being on the platform, before the backing began and at the time of the collision, actually occurred; and that he was there with the permission of the man in charge of the cars. This may have been in contravention of rules or orders not known to the plaintiff, but within the knowledge of Cole, who, however, made no objection to the plaintiff being where he was. This was the only occasion when the plaintiff had taken this ride on the train for his own convenience when in charge of these men, and he did not know Cole—but the uncontradicted evidence is that he had done this on many other occasions without check or comment from the officials—so that he was not a

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mere trespasser, but acting under an honest mistake that he was not transgressing by this permissive use of the train. I should judge, on this evidence, his legal status to be that of a licensee getting a gratuitous "lift" on the cars to the stopping place at the junction. The duty of the defendants was to manage their cars so that no negligent injury should be done to the Pere Marquette cars using this "lead," which is said to be their property. It is conceded that the caboose of the defendants was moved violently against the backing cars of the Pere Marquette railway so as to injure the plaintiff. This is characterised by the learned Chief Justice as the "result of gross negligence:" p. 116 of the notes of evidence.

If the plaintiff was not wrongfully where he was on the Pere Marquette train, then he is entitled to recover damages against the defendants, by the English authorities. The last case is *Harris v. Perry & Co.*, [1903] 2 K.B. 219, where the plaintiff was permitted to ride on an engine by an employee who was in supervision, and it was held that the defendant, as undertaking to carry gratuitously, must exercise reasonable care. The defendant resisted liability on the ground that the plaintiff got on the engine without any permission from him, and that he had expressly forbidden such use to be made of it—but it was proved that workmen and others were in the habit of riding there despite the prohibition. The Judge left three questions to the jury: (1) Was the plaintiff on the engine with the permission of Rowell? (2) Was he there for his own convenience or for the benefit of the defendant? (3) Was the accident due to the negligence of the defendant's servants? The first and third were answered "yes" and to the second, "For his own convenience." The trial Judge, Wills, J., entered judgment for £150, and this was upheld on appeal by Collins, M.R., with whom agreed Stirling, L.J., and Mathew, L.J. (an exceptionally strong Court).

An earlier American case on much the same lines is *Wilton v. Middlesex R.R. Co.* (1871), 107 Mass. 108, in which the holding was: "If a person riding with due care on the platform of the horse-car of a street railroad corporation, not as a passenger for hire, but by invitation of the driver, and without collusion with him to defraud the company, is injured through his negligence in driving the car, the corporation is liable." The Court observed

that it was immaterial that the driver was acting contrary to instructions—that was a matter between him and his master; and *Philadelphia and Reading R.R. Co. v. Derby* (1852), 14 How. (S.C.U.S.) 468, is cited to support the law.

The extent of liability is carried beyond this in *Railroad Co. v. Stout* (1873), 17 Wall. (S.C.U.S.) 657, 661, where Mr. Justice Hunt says: "We conceive the rule to be this: that while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts."

The same doctrine appears to be recognised by the Supreme Court of Canada in *Sievert v. Brookfield* (1905), 35 S.C.R. 494, the head-note of which is: "A trespasser or bare licensee injured through negligence may maintain an action." See also *Grand Trunk R.R. Co. v. Richardson* (1875), 91 U.S. 454, 471—a railway company "is bound to use ordinary care to avoid injury even to a trespasser."

Harris v. Perry was referred to in *Nightingale v. Union Colliery Co. of British Columbia*, 35 S.C.R. 65, 67, and hypothetically questioned by one of the Judges, but, in view of the later decision in the same volume, at p. 494, it retains its full force. However, in this case the finding, which both parties accept, is that the act was not only of negligence but of gross negligence—if the subtle distinction is to be preserved.

Now, the law is with the plaintiff clearly if he is a licensee, and I think so also if he is an honest or mistaken trespasser. Such an one is described by Beven, Can. ed. (1908), vol. 2, at pp. 952, 953. I do not read the answers of the jury to the questions submitted as a finding that the plaintiff was a trespasser upon the defendants' train (see pp. 116, 117.) All they have found is that the plaintiff was not on the train or platform by the permission of the Pere Marquette Railway Company.

It is not without significance that the accident—the collision—happened upon the tracks laid on the public highway on Waterloo street. The plaintiff was not a trespasser *quoad* the defendants—the public were permitted to pass over the Grand Trunk platform where the Pere Marquette train was unloaded, and from

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which it backed up to the junction, and the Grand Trunk book of rules, as read to the jury by counsel, at p. 82 of the book of evidence, seems to have been improperly received, and might have prejudiced the jury against the plaintiff. However, this would not now be important except in view of a new trial. And we are not obliged to grant a new trial, by reason of the consent given, at p. 115, that if there is any point necessary for the determination of the rights of the parties not covered by the questions submitted, it should be determined by the Courts, so as to save another trial.

Now, the omission in the questions appears to me to be this. At p. 101 the Chief Justice says: "I propose to ask the jury whether the plaintiff was on the train with the knowledge and consent of the Pere Marquette Company. Then I will ask them whether that consent was the consent of the company itself or of the trainmen who were operating the road." Now, the first question was directly left to the jury, but not this last one, which appears, in view of the subsequent parts of the charge, to be most essential.

The Chief Justice says to the jury (p. 103): "If you answer 'yes' to questions 1 and 2 (*i.e.*, as to the permission by the company), I will ask you to state the grounds on which you come to the conclusion that he was rightly on the train or platform."

He then puts the plaintiff's contentions: (1) that he was there with the knowledge and therefore with the permission of the train hands, who saw him and recognised his right to be there; (2) not only so, but he had been there on other nights in the same way upon the same train, and no objection made and no fare demanded, and that he was permitted to take the journey; (3) then he called witnesses who deposed that for a period of years (six or seven) they were in the habit of occasionally using the train in the same way with the knowledge of the operating train hands. Then he says that an inference may be drawn from that course of practice that the railway company itself had knowledge of and was assenting to what was being done.

At p. 105, he again puts it to the jury that they have to consider and come to a conclusion as to what was the general practice so as to implicate the company itself. At p. 107, he says "it requires a very strong case to draw the inference from the course

of practice sufficient to warrant the conclusion that the company itself knew of the practice, or that the knowledge of the practice should be attributed to them, and that, therefore, the plaintiff was there by the permission of the company; but, if you come to the conclusion that there was a general course of practice of persons getting without objection upon the platform of this train, not by one set of officials but by different officials, different trains, then that is evidence upon which you may conclude that it was a practice sanctioned by the railway company:" p. 106.

Then he proceeds: "After putting to you questions 1 and 2, which you can answer 'yes' or 'no' to, I have asked you to state, in answer to the third question, the grounds upon which you find (if you do find) that there was permission given by the company to the plaintiff. In answering that question (*i.e.*, the third) all the grounds that go to form your judgment ought to be stated . . . so that if you agree with the plaintiff's view, and are of opinion that he was there with the permission of these trainmen, you will state that in your answer as one of your reasons, and if you come to the conclusion that the practice was so general that knowledge of it must be imputed to the company, you will so state."

At p. 113, a juryman asks, "If the first two questions should be answered 'no,' are there any further questions?" The Chief Justice: "You need not bother yourselves with any more. It is only if you answer 'yes' that an answer is wanted to the third question." Then the jury retire at 5 p.m.

Afterwards, in their absence, Mr. Faulds says: "I submit they are liable also even if this man was a pure licensee, *i.e.*, if the company did not know he was there, but the trainmen did consent to it:" p. 114. The Chief Justice says he will get all that by the third answer.

But it is manifest from the nature of the charge that it would be only got by the third answer *sub modo*, *i.e.*, if the jury had first arrived at a conclusion upon the general course of practice directly implicating the company. Having found against such a general course of practice, they were not called upon to express any opinion upon or give any answer to the vital question, was he there with the permission of the trainmen in charge of the train? It was open to them to find, and I think they should

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have found, upon the direct evidence as to that occasion, that he was there with the knowledge and consent of the man conducting the backing operations, and was at his side, and also, on the uncontradicted evidence, that he and others had been there on many other occasions—though the jury may have inferred from the method of instruction that these instances were not sufficient to evidence a general habit and general course of practice which would justify them in attributing knowledge to the company. To my mind, in reading the report of the trial, the conclusion is that the jury were imperfectly charged. The evidence as it stands is quite as strong as that given in the *Harris v. Perry* case, and which, being submitted to the jury on a specific question, would have resulted in the answer that, though riding for his own convenience and gratuitously, he was there with the permission of the defendants' trainmen. And such an answer would justify a verdict for the plaintiff.

Mr. Faulds also submitted at the trial that, even if the plaintiff was a trespasser, the Grand Trunk Railway Company were liable (p. 114). This aspect of the case was not much argued before us, but it is open to very serious argument in view of the references I have given.

What is the situation as between the Grand Trunk Railway Company and the Pere Marquette Railway Company? The Grand Trunk station at London is used by the Pere Marquette to get access to the track or lead which crosses Waterloo street, and goes to the Pere Marquette yards at Colborne street. The daily train of the Pere Marquette from Walkerville to London arrives at 9.20 p.m. or thereabouts, and, after unloading, is backed up with coach end-foremost to the yards. The signal was given by the Pere Marquette when ready, and the Grand Trunk officials set the switches for the backing operation. Grand Trunk switches run into this lead, and on the night of the accident the track was clear till the backing car got within some twenty feet of the switch on Waterloo street, when suddenly a caboose or van was propelled into the Pere Marquette passenger coach, and the plaintiff was thrown from the end platform of that coach and both his legs taken off. It was a dark night; no light visible on the caboose; but on the backing train, facing the caboose, were Cole and Freely, each with a lantern. The yard foreman and helpers

of the Grand Trunk were responsible for allowing the caboose to be shoved on the Pere Marquette lead while that train was backing to its yard. What is the situation of the railway company as to the injured man? People were allowed to pass over the Grand Trunk station to get across it to go home or to go on the Pere Marquette train. The Grand Trunk Railway Company knew that people were on the backing car every evening, the train hands, and, it may be, workers in the employment of the Grand Trunk and the Pere Marquette, and their friends, and sometimes "outsiders."

The Pere Marquette carried all these people as the cars were backed down the switch. As to the "outsiders," whether they were there pursuant to a repeated practice, or were good-naturedly winked at by the officials, or were allowed to stay on if they were noticed only after the train started (as Squier and Freely testify, pp. 67 and 73), still they were actually there, being carried without any attempt at secrecy. Just as it would not be competent for the Pere Marquette company to put off any of these people with extreme violence, neither would it be permissible for the Grand Trunk company to exercise violence towards them, whether by wilful act or by negligent misconduct. The personal safety of a human being (though he be a trespasser) must not be endangered by the negligent act of another. Given the circumstances of this case, it does not seem to me that the defendants are exempt from liability though the plaintiff was nothing else than a mere trespasser.

As to the degree of liability incurred by the Pere Marquette Railway Company, had they been the authors of the injury, and imputing a like degree of liability as to the Grand Trunk Railway Company—and for the defendants the situation cannot be put more favourably to them—the authorities mark a distinction of duty between the case of permitting a licensee to be on a place or to pass over a place, and that of taking him on a vehicle or otherwise carrying him. That is discussed in *Harris v. Perry*, and it is indicated that a greater degree of care is called for in the latter case. But, after all, it is a question for the jury, and the observations of Esher, M.R., in *Thatcher v. Great Western R.W. Co.* (1893), 10 Times L.R. 13, are very pertinent. "No doubt," he says, "in strict logic the railway company had not

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the same amount of duty to persons permitted to come on their premises as they had to persons who paid them money in consideration of being carried as passengers. But, so far as regarded the taking of means for providing for personal safety, it was impossible to measure the difference between their duty to the one class of persons and their duty to the other." And in the same case Lopes, L.J., says (discarding the term "licensee"): "If a person permitted another to come on his premises and knew him to be on his premises, it was his duty to take reasonable care not to injure him." See *Barnes v. Ward* (1850), 9 C.B. 392, 420.

It appears to me that the plaintiff is entitled to hold the damages assessed, and that it is not necessary for us to direct (as it would have been but for the consent of counsel already stated) that there should be a new trial.

Judgment for the plaintiff with costs.

[FALCONBRIDGE, C.J.K.B.]

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*Criminal Law—Conspiracy—Trade Combination—Criminal Code, sec. 498—
Restraint of Trade—Prevention of Competition—Evidence—Bona Fides
—Wholesale Grocers' Guilds—Protection of all Wholesale Dealers—
Fixing of Prices.*

The defendants, the Dominion Wholesale Grocers' Guild, the Ontario Wholesale Grocers' Guild, and certain individuals carrying on the business of wholesale grocers, were indicted, under sec. 498 of the Criminal Code, for conspiring, combining, agreeing and arranging one with the other and others of them, and with other persons, to restrain and injure trade and commerce in relation to sugar, tobacco, starch, and other articles and commodities, the subject of trade and commerce (sub-sec. (b) of sec. 498), and also unduly to prevent, etc., as in sub-secs. (c) and (d).

The defendants elected to be tried without a jury, and the trial Judge found the facts to be:—

1. The defendants have not, nor have any of them, intended to violate the law.
2. Nor have they, nor have any of them, intended maliciously to injure any persons, firms, or corporations, nor to compass any restraint of trade unconnected with their own business relations.
3. They have been actuated by a *bonâ fide* desire to protect their own interests, and those of the wholesale grocery trade in general.
4. As far as intention and good faith or the want of it are elements in the offence with which they are charged, the evidence is entirely in their favour.

And *held*, upon the evidence, and the authorities reviewed in the judgment, that the defendants were not guilty of a breach of the law.

The elements which distinguished this case from *Rex v. Elliott* (1905), 9 O.L.R. 648, were: (a) that the endeavour of the Wholesale Grocers' Guilds was to protect the interest and welfare of the wholesale grocers of Canada, whether they were members of the guilds or not; and (b) that the prices were in all cases fixed by the manufacturers.

It would be dangerous to accept as a settled doctrine of political economy or proposition of law, that, under any and all conditions and at all times, every man or corporation should be declared to have an absolute and inalienable right to buy and sell, trade or barter, with any other person or corporation, without restriction as to quantity or price.

THIS was a prosecution for an alleged conspiracy connected with trade and commerce, laid under sec. 498 of the Criminal Code.

The indictment was found by a grand jury at Hamilton, before FALCONBRIDGE, C.J.K.B., at the autumn assizes, 1907.

The indictment charged that Henry C. Beckett, George E. Bristol, John I. Davidson, Thomas B. Escott, W. G. Craig, Joseph E. Eby, and Thomas Kinnear, the Dominion Wholesale Grocers' Guild and the Ontario Wholesale Grocers' Guild, did in and during the years 1898, 1899, 1900, 1901, 1902, 1903, 1904, and 1905, at the city of Hamilton, in the county of Wentworth, and elsewhere in the said Province, unlawfully conspire, combine, and agree and arrange one

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with the other and others of them, and with some 208 named persons, firms, and corporations, and with the several members during the years aforesaid of such as are corporations, and with the several officers and members of committees of the Dominion Wholesale Grocers' Guild and of each of the Provincial Guilds, during the years aforesaid, and other persons, firms, and corporations at present unknown:—

(1) To unduly limit the facilities in producing, manufacturing, supplying, and dealing in sugar, tobacco, starch, canned goods, salt, and cereals, and other articles and commodities, being articles and commodities which are the subject of trade and commerce.

(2) And to restrain and injure trade and commerce in relation to such articles and commodities.

(3) And to unduly prevent, limit, and lessen the manufacture and production of such articles and commodities.

(4) And to unreasonably enhance the price of such articles and commodities.

(5) And to unduly prevent and lessen competition in the production, manufacture, purchase, barter, sale, and supply of such articles and commodities, against the form of the statute in such case made and provided and against the peace of our Lord the King.

Section 498 of the Code is as follows:—

498. Every one is guilty of an indictable offence and liable to a penalty not exceeding \$4,000 and not less than \$200, or to two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding \$10,000, and not less than \$1,000, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company,—

(a) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or,

(b) to restrain or injure trade or commerce in relation to any such article or commodity; or,

(c) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or,

(d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of

any such article or commodity, or in the price of insurance upon person or property.

2. Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees.

The persons and corporations against whom the indictment was found exercised the option given by sec. 581 of the Code, and elected to be tried before FALCONBRIDGE, C.J., without the intervention of a jury; and by consent the venue was changed to Toronto.

Evidence was taken on the 21st September, 19th, 20th, 21st, and 23rd October, 11th and 12th November, 1908, and 7th January, 1909.

Among the exhibits was a printed book (exhibit 1), containing the by-laws of the Dominion Wholesale Grocers' Guild (22nd January, 1903), with a preliminary recital that the Guild had been in existence for some years, and had been formed to promote the interests of the wholesale grocery trade in Canada.

By-law 16 set forth the duties of the Executive Committee as follows: (A) To officially confer with manufacturers on matters concerning the welfare of the trade. (B) To arrange with manufacturers of staple lines that no sales shall be made by them to the retail trade at better prices or on better terms than the *list prices*, and that all such sales shall be charged through the wholesale trade as the proper channel of distribution. (C) To arrange that the list prices shall hereafter be known as the prices to be sold at by all wholesalers to the retail trade. (D) To arrange that manufacturers and other dealers observe the list prices as fixed by the manufacturers in transactions with the retail date.

By-law 17: The Executive Committee of each Province shall report arrangements effected with manufacturers and others to the presidents of the Dominion and Provincial Guilds. The secretary of the Dominion Guild shall send to each member thereof a printed copy of same.

By-law 18: In the event of a manufacturer or dealer declining to meet the views of the trade in a reasonable spirit, the same shall be advised to the president of the Dominion and Provincial Guilds, and the secretary of the Dominion Wholesale Grocers' Guild shall notify the members thereof.

By-law 19: In cases where manufacturers of similar lines are

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not unanimous in meeting the views of the trade, the members of the Dominion Wholesale Grocers' Guild pledge themselves to give their preference and support to such manufacturers and dealers as, in the opinion of the Committee, are reasonably entitled to first consideration.

Under by-law 19:—

The following is a suggested form of agreement to be made where possible with manufacturers and others in any arrangements made by the Executive Committee on behalf of the Dominion Wholesale Grocers' Guild:

"Whereas, after consulting the representatives of the Dominion Wholesale Grocers' Guild, and it appearing to us reasonable and necessary as a protection to ourselves and the trade, and with a view to extending our trade and securing the cordial support of the members of the Dominion Wholesale Grocers' Guild, this agreement witnesseth:

"That our list prices shall be known as the prices to be sold at by ourselves and wholesale dealers to the retail trade.

"That we will not sell nor will we permit any of our salesmen or representatives to sell to the retail trade at less prices or on better terms of cash discounts than those set forth in our list prices, and all orders taken by us from the retail trade shall be charged through some firm members of the Dominion Wholesale Grocers' Guild which medium we consider as the proper channel of distribution.

"That our wholesale trade discounts shall only be allowed by us to such houses as are strictly wholesale and do solely a jobbing trade.

"That our wholesale discount shall be —

"That our cash discounts shall be —

"That where it is satisfactorily established that any buyer of our goods is violating the intent and spirit of this agreement, we will decline to sell such wholesale house except under such conditions as will be satisfactory to us and a protection to the trade generally."

By-law 20: In cases where new lines of proprietary goods are offered to the trade, each member of the Guild agrees to require the seller to enter into an agreement or express a willingness to enter into an agreement guaranteeing the members of the Guild a profit,

and where such willingness is expressed on the part of the seller the agreement with such seller shall be executed as soon as possible, and duly advised to all parties interested.

By-law 21: Each member of the Guild agrees to recommend any seller of new proprietary goods to the members of the Executive Committee of the Province in which such member does business, with a view to protecting the interests of the trade and increasing the business in respect thereof.

By-law 38: Application for membership to the Dominion Wholesale Grocers' Guild shall be made through the local president presiding in the town or district in which such applicant does business, and shall be on a form reading as follows:

“FORM OF APPLICATION (A)

“The undersigned hereby respectfully make application to become members of your local Wholesale Grocers' Association, and thereby become members of the Dominion Wholesale Grocers' Guild.

“We are carrying on a strictly wholesale grocery business not connected in any way directly or indirectly with the sale of goods by retail or direct to the consumer.

“If we are admitted to membership we hereby agree to pay the membership fee . . .

“We also agree to abide by the rules and regulations, as at present in force by your Guild, and any others that may hereafter be adopted at annual or special meetings of the Dominion Wholesale Grocers' Guild.

“In case we at any time cease to carry on a strictly wholesale grocery business, we shall cease to be members of the Guilds, and shall have no interest in the funds thereof, and shall forfeit all claims whether accrued or accruing to all rebates and other benefits to which we would otherwise be entitled, but save as to payment of membership fees thereafter, we shall be and remain bound by all the provisions of the by-laws of the Guilds, so far as applicable.

“FORM OF APPLICATION (B)

“The undersigned hereby respectfully make application to become members of your Wholesale Grocers' Association, and thereby become members of the Dominion Wholesale Grocers' Guild.

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"In making the application, beg to state that our business is being carried on as a strictly wholesale house and not a co-operative concern whose members or stockholders are made up of retail merchants; we are not in any way connected directly or indirectly with any plan or agreement by which our stock-holders are to receive dividends on the basis of their purchases."

(The other provisions were the same as in the Form (A).)

In the printed book exhibit 1 were contained the minutes of the annual general meeting of the Dominion Wholesale Grocers' Guild, held on the 21st and 22nd January, 1903, at which the defendants or some of them were present. The following are extracts from the minutes:—

"A number of firms outside the Guild being at present in enjoyment of the benefits of the sugar arrangement without sharing in the cost, the following resolution was introduced in order to prevent the continuance of this state of affairs: 'That wholesale grocers using the Equalized Rate Books and not subscribing towards the expenses of the Guild, be charged the sum of \$5 for each book.'"

"The following resolution was . . . carried: 'That this meeting expresses the view that the Dominion Wholesale Grocers' Guild are loyal to the Empire Tobacco Co., and consider that the company should confine themselves to the wholesale trade only, and we would respectfully urge upon them to discontinue selling to the retail trade.'

"The unsatisfactory nature of the contract on which canners sell their goods to the trade, was considered at length, and it was decided to take advantage of the fact that the canners were in session in Toronto, and interview them with a view to inducing them to adopt a form of contract which would be more just and equitable than the one now in force . . .

"Consideration was given to a proposition from Toronto that the salt manufacturers should be asked to make an arrangement with the Guild which would enable the trade to secure a fair profit on that article. The suggestion being approved of, the following were appointed a Committee for the purpose: . . ."

Exhibit 2 was a printed book containing proceedings of the Ontario Wholesale Grocers' Guild. At p. 44 a circular from the Chairman of the Price Committee of the Guild to the trade, dated the 26th November, 1904, was printed, as follows:—

"Please note that no arrangement has as yet been effected between your Price Committee and the sellers of Clover Leaf salmon. This firm declined last year to confine their sales to the strictly wholesale houses in the Province of Ontario, in consequence of which the trade in Ontario declined to handle their goods. In the Province of Quebec the sellers made it impossible for the wholesalers handling their goods to make a living profit by issuing a list of selling prices to the retail trade that did not leave a margin of much over four per cent. We are advised by the Quebec Price Committee that until satisfactory arrangements are completed with the Clover Leaf people, the trade in the Province of Quebec will not handle the goods for next season. We, therefore, expect you will see it is to our mutual interests to decline to buy Clover Leaf salmon until such time as we are able to advise you that satisfactory arrangements have been completed. Kindly refer the sellers of Clover Leaf salmon to your Price Committee until further advised."

The following letter from Mr. W. H. Gillard, a member of a Hamilton wholesale grocery firm, to Mr. T. H. MacPherson, a member of another firm in the same city, and a member of Parliament, was relied on by the Crown. It was as follows:—

"I learned to-day that Messrs. T. B. Greening & Co., of this city, have decided to go into the sugar business, and have already given an order for a lot of foreign granulated. As they are outside of our sugar agreement, their idea, no doubt, is to use this article as a lever to sell their teas, which will, as you can see, be a very dangerous competition, and which we must at once take steps to counteract, for, if we allow them to get a foot-hold with the trade, others will follow, and all our efforts to secure a legitimate margin on this article will be lost, and the trade will again have to fall back into the 'slough of despond,' from which they have been so desperately struggling to escape, unless the Government comes to their aid with a larger share of protection to our manufacturers against bounty-fed sugars. I do hope, therefore, that you, knowing the situation, will use your full power and influence with the Ministers to assist the trade against this ruinous foreign competition.

"In appealing to the Government through you for their serious consideration of the question, I voice the sentiments of the whole grocery trade of Canada, both wholesale and retail, neither of whom seek nor expect to make a profit on this great staple more than

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sufficient to cover the risk, handling, and distribution, but they do most earnestly hope that something can be done to cure the great evil of selling at cost or even at a loss.

"Considering the importance of the grocery trade and the amount of capital invested, its interests should receive liberal treatment, which, under the present proposed tariff, it is the general opinion of, my *confrères* in the trade, it has not so far received, but which I trust, upon further consideration and before the session closes, the relief they ask will be granted.

"Before I close, I would again remind you that the opinion expressed in this letter is not mine only, but that of the whole trade in Canada, with few exceptions, if any; and, should you succeed in convincing the Government of the justice of their claims, you will earn the hearty appreciation and gratitude of your fellow-merchants."

At p. 2 of exhibit 2 the following was printed:—

"MANUFACTURERS' AGREEMENT A No. 5.

"Memorandum of agreement (made in triplicate) this 15th day of December, 1904, between the International Brokerage Co., of Kingston, who are the accredited agents for Canada of the Great Western Cereal Company, of Chicago, manufacturers of cereals, and the Price Committee representing the Ontario Wholesale Grocers' Guild.

"Whereas, after consulting with the representatives of the Ontario Wholesale Grocers' Guild, and it appearing to us reasonable and necessary as a protection to ourselves and the wholesale grocery trade of Ontario, and with a view to securing the cordial support of the Ontario wholesale grocers, and thereby extending our trade.

"Now this indenture witnesseth:—

"1st, that our list prices on lines of goods as per list attached hereto, *viz.*, 'Coupon' oats in 5-lb. packages (each package containing a Royal German baking dish), 20 packages in each case, at \$4 per case; 'Quail' oats in 5-lb. packages (each package containing a handsome bowl), 20 packages in each case, at \$4 per case (in five case lots and over, we to pay freight to destination), shall hereafter be known as the prices at which our goods are to be and shall be sold by ourselves and the wholesale dealers to the retail trade.

"2nd, that we will not sell, nor will we permit any of our salesmen or representatives to sell or offer to sell, to the retail trade at lower prices or on better terms of time and cash discount than those set forth in this agreement, or in the price list attached hereto.

"3rd, that on all orders taken by us or through our representatives from the retail trade, we agree to fill all such orders through one or more of the wholesale firms as per list attached hereto. The trade discount on all such orders to be $2\frac{1}{2}$ per cent. less than the trade discount hereinafter referred to.

"4th, that we will allow the wholesalers' trade discount to such wholesale firms only as are on the list attached hereto, and hereby agree not to sell at better than list prices any firm or firms claiming to be strictly wholesale, unless such firm's name is on the list attached hereto, or afterwards added by notice from the Price Committee of the Ontario Wholesale Grocers' Guild.

"5th, that, subject to the conditions herein set forth, we will allow a trade discount of 40 cents per case on 'Coupon' oats, and 50 cents per case on 'Quail' oats, and also a discount for cash in 10 days of 1 per cent.

"6th, that, in the event of its being satisfactorily established to the Standing Committee of the Dominion Wholesale Grocers' Guild that any wholesale buyer on the list attached hereto has in any way violated the selling prices and terms to the retail trade, by the giving of rebates, extra cash or trade discounts, extra time without interest, or in any other underhand or unprovided for way, or has sold at less than retail prices or on better terms of time and cash discount to any firms claiming to be strictly wholesale, but not on the list attached hereto, we, the undersigned, agree, upon receiving notice from the president of the Ontario Wholesale Grocers' Guild, as recommended by him, to do one or other of the following: (1) to refuse to sell such firm in future; (2) reduce the amount of trade discount to 5 per cent.; (3) or refuse to allow any trade discount whatever.

"7th, if the market condition should warrant higher or lower prices than those stated above, the same advance or reduction shall apply to both wholesaler and retailer.

"8th, we also agree, if requested by the Quebec, Winnipeg, British Columbia, and Maritime Provinces Guilds, to make similar arrangements to that made with the Ontario Wholesale Grocers'

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Guild, namely, that these goods are to be sold at a fixed selling price to the retail trade, with the same discounts that are allowed the Ontario trade, the limited prices to be made for the different sections of the Dominion on the same basis of price as Ontario, taking into consideration the difference in freights for each section."

(Signed by the International Brokerage Co.)

The list (B.) attached contained the names of seventy-five wholesale grocers in Ontario and Quebec.

At p. 55 of exhibit 2 the following was printed:—

"MANUFACTURERS' AGREEMENT A No. 6.

"Memorandum of agreement (made in triplicate) this 26th day of January, 1905, between St. Lawrence Starch Co. Limited, Port Credit, and the Price Committee representing the Ontario Wholesale Grocers' Guild and Quebec Wholesale Grocers' Guild.

"Whereas, after consulting with the representatives of the Wholesale Grocers' Guild for Ontario and Quebec, and it appearing to us reasonable and necessary as a protection to ourselves and the wholesale grocery trade, and with a view to securing the cordial support of the wholesale grocers, and thereby extending our trade.

"Now this agreement witnesseth:—

"1st, that our list prices on lines of grocery starches, as manufactured by us for sale to the retail trade, shall hereafter be known as the prices at which our goods are to be and shall be sold at by ourselves and the wholesale dealers to the retail trade; the same conditions shall apply to any private brands which might be put up for or sold by any house on list B.

"2nd, that we will not sell nor will we permit any of our salesmen or representatives to sell or offer to sell to the retail trade at lower prices or on better terms of time and cash discount than those set forth in this agreement.

"3rd, that on all orders taken by us or through our representatives from the retail trade, we agree to fill all such orders through the wholesale trade.

"4th, that we will allow the trade discounts as set forth in paragraphs 6 and 7 to such wholesale firms as are on list B. attached hereto, and hereby agree not to sell at better than list prices any firm or firms claiming to be strictly wholesale, unless such firm's name is on the list attached hereto, or afterwards added by agree-

ment with the Price Committee of the Ontario Wholesale Grocers' Guild or Quebec Wholesale Grocers' Guild.

"5th, that we will not sell at better than list prices any buying clubs or retail co-operative buying organisations or any brokerage or other combinations or any firm claiming to be strictly wholesale, unless such firm's name is on the list attached hereto, or afterwards added by notice from the Price Committee of the Ontario Wholesale Grocers' Guild or Quebec Wholesale Grocers' Guild, except as provided for under a special agreement with the Price Committee.

"6th, that, subject to the conditions as herein set forth, our terms on grocery starches to the wholesale trade as per list B, will be list prices, with a trade discount of 8 per cent. 30 days net, or 10 per cent. for cash in 15 days, and

"7th, conditional upon the wholesale trade, as per list B, not having sold grocery starches at less than list prices or on better terms of time and cash discount than 30 days, or 1 per cent. 10 days, also conditional upon the wholesale trade, as per list B, not having purchased directly or indirectly grocery starches, except of Canadian manufacture, and conditional upon the other terms of this agreement being strictly observed and lived up to, we will allow a further trade discount, payable quarterly, of 7 per cent., upon the purchaser signing the declaration as set forth in clause 8.

"Declaration.

"8th. We, the undersigned wholesale grocers, having complied with the terms of agreement A No. 6, dated the 26th January, 1905, between the starch manufacturers and the Price Committee of Ontario and Quebec Wholesale Grocers' Guilds, declare as follows:—

"We have not sold nor have we permitted our travellers or salesmen to sell in the Province of Ontario or Quebec starches to the retail trade at less than current list prices (as issued by the said manufacturers from time to time), or on better terms of time and cash discount than 30 days or 1 per cent. for cash in 10 days. We have not ourselves accepted, nor have we permitted our travellers or salesmen to accept or agree to accept, from the manufacturers parties to this agreement any inducement in the form of extra discounts, bonuses of free goods, or in any other unprovided for way, beyond the trade discounts as set forth in clauses 6 and 7 of

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said agreement. We have not permitted our salesmen, directly or indirectly, to take any part in the making up of orders between two or more retailers for direct shipment, freight paid, in 10-box lots, nor have we offered or permitted our salesmen to offer to the retail trade any inducements, in the form of free goods or other bonuses, that would indirectly be equal to a concession in price to the retailer. And we are entitled, in the terms of said agreement, to the discounts agreed upon for quarter ending ———. (Signed) ———, wholesale grocer.

“9th. The undersigned hereby agree that no order for special label goods shall be accepted unless for a *bonâ fide* order for 100 cases or over. Such special label to be provided or paid for by the buyer.

“10th, that, in the event of its being satisfactorily established to the Standing Committee of the Dominion Grocers’ Guild that any wholesale buyer on list B attached hereto has in any way violated the selling prices and terms to the retail trade, by the giving of rebates, extra cash or trade discounts, extra time without interest, or in any other underhand or unprovided for way, or has sold at less than list prices or on better terms of time and cash discount to any firm claiming to be strictly wholesale, but not on the list attached hereto, and not direct buyers of starches, we, the undersigned, agree, upon receiving notice of same from the president of the Ontario Wholesale Grocers’ Guild, or president of the Quebec Wholesale Grocers’ Guild, to cancel all rebates to which such firm would otherwise be entitled for the quarter ending the period in which such violation occurred, and also agree not to sell such firm in future except at list prices, and no trade discount allowed until such firm subscribes to an agreement to carry out the terms of purchases and sale as set forth in this agreement.

“11th. This agreement to take effect on the 26th January, 1905.”

(Signed by the St. Lawrence Starch Co. Limited.)

The list (B) attached was the same as that appended to the cereal agreement.

[The above are only a few of the documents relied on by the Crown as establishing their case against the defendants.]

January 7, 8, and 9, 1909. The case was argued.

G. T. Blackstock, K.C., and S. F. Washington, K.C., for the

Crown. The prosecution is under sec. 498 of the Code and under the three sub-sections (b), (c), and (d); (b) is to restrain or injure trade and commerce; (c) is the clause dealing with unreasonably enhancing prices; and (d) is unduly preventing or lessening competition in the purchase, barter, sale, and supply of articles of trade and commerce. We do not rely upon (a). The Dominion Wholesale Grocers' Guild is composed of ninety-five per cent. of the wholesalers throughout the Dominion, and the objects for which the Guild was instituted are set forth in the printed book of by-laws. [Counsel referred to several of the exhibits and the testimony of some of the witnesses as establishing that a combine existed among the wholesale grocers.] There are certain natural laws of trade which it is important to keep steadily in mind in considering the question of whether there has or has not been a restraint of trade. One is that it is the right of every person to buy where he pleases and sell to whom he pleases and at the best price he can get; another, that he should be permitted to sell his goods where he pleases, and especially for what he pleases. It is the right of every man to go into whatever business he pleases or to remain out of any business he pleases. Trade knows no geographical lines; trade in its natural state flows in all directions, so that any restriction, anything which interferes with the natural flow of trade in any direction, is a restraint of that trade, to a greater or less extent, depending upon the circumstances. Everything which interferes with the natural operation of these laws is a restraint; protection is a restraint; the protective tariff is a restraint. Why was this legislation passed? The reasons are shortly set out by Clute, J., in *Wampole & Co. v. Karn Co.* (1906), 11 O.L.R. 619, 628. It is quite clear, upon the evidence, that certain channels of trade, *e.g.*, wholesale houses with retail counters, large retail stores, co-operative institutions, departmental stores, were open until the Guild made its appearance and closed them or tried to close them. Coercive measures were in effect taken by the Guild. The defendants called their measures "suggestion." When a highwayman with a pistol suggests to a traveller that he give up his watch, the traveller usually accedes to the suggestion. The enhancement of prices is shewn by the evidence of the defendants—the reason for the formation of the Guild was that the wholesalers required and demanded increased profits; they succeeded in getting them. Whenever there is an increase in profit,

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• it comes out of the consumer. The maintenance of fixed prices also tends to enhance prices. The statute says "unreasonably enhance the price." The word "unreasonably" has not been defined by the Court, but "unduly," which probably has a similar significance, has been defined in *Rex v. Elliott* (1905), 9 O.L.R. 648, 661, *per* Osler, J.A. Now, what is conspiracy? See *Regina v. Parnell* (1881), 14 Cox C.C. 508, 513, for a definition. A conspiracy is proved in this case to prevent the retail grocers from getting goods as they had been accustomed to do: there is a conspiracy at common law, apart from this statute altogether. See *Regina v. Gibson* (1889), 16 O.R. 704, decided before this statute. See also *Quinn v. Leathem*, [1901] A.C. 495. While it may be said that in this case the object of the Guild was lawful, the means they adopted to attain their object were unlawful and criminal. This case is not distinguishable from *Rex v. Elliott*, *supra*. See also *The King v. Gage* (1907-8), 13 Can. Crim. Cas. 415, 428; *The King v. Clarke* (1908), 9 W.L.R. 243, 14 Can. Crim. Cas. 46, 57. The evidence shews that the Guild had the power to do what they pleased with the manufacturers, and that they have done it. It is for the Court to say whether that is to continue or not. The conduct and design of the defendants contravene almost every sub-section of sec. 498. What these defendants have done is in restraint of and injury to trade. The central idea in the whole of their arrangements is that they should have an entire monopoly of this particular branch of trade. The Guilds decide who are the persons entitled to the benefit of the arrangements they are making. The defendants have unduly prevented the manufacture and production of articles and commodities, and also have unreasonably enhanced the price thereof. The correspondence shews that the very idea which they had in mind was to prevent competition. Instead of the manufacturer being approached by a great crowd soliciting him to come down in his price, he now has a complacent body who allow him to fix his price; no protest against it as long as he does not advance to a point where it is absolutely prohibitive. There is a monopoly in the manufacture, there is a monopoly in the distribution, and therefore there is no competition, no aggressive assailing of the manufacturer, as there would be if he were open to the ordinary influences of trade. There is no competition among the wholesalers; the prices are fixed. The retailer is to some extent regarded in these arrangements, but not the

public. If the Court reaches the conclusion, on this evidence, that the general arrangements made by these defendants are on the whole free from objection, informed by a proper spirit, conceived with proper idea, and aimed at the accomplishment of proper results, the Crown does not desire to see some details of their conduct which are objectionable fastened upon them for the purpose of finding them guilty of the charges that are preferred against them.

E. F. B. Johnston, K.C., *E. H. Ambrose*, and *Eric N. Armour*, for the defendants. In arriving at what is the true principle upon which a matter of this kind may be approached, and in dealing with it from a standpoint of either a legal or judicial character, the Court is not to be governed by technical rules of law as in ordinary cases: *Jolly on Contracts in Restraint of Trade*, pp. 1, 2, 3; *Nordenfjelt v. Maxim Nordenfjelt Guns and Ammunition Co.*, [1894] A.C. 535, 552, 553, 556. The natural trade argument can have no application at the present moment. The whole state of trade, the whole condition of our law, the whole complex condition of society, are purely artificial. We cannot accept the doctrine that there should be absolutely a free right to trade and barter as between man and man; there must be regulation—reasonable regulation, we admit; or without it trade would be demoralised and the country bankrupt. The tariff itself, imposed by Act of Parliament, creates a highly artificial state of trade, destroys the natural conditions, and takes away the right to sell and buy at any price and any place one pleases. The sale of these articles, according to the method adopted, results in a lower price to the consumer than if the more expensive method, of the manufacturer dealing directly with the retailer or the consumer, was in force. [Counsel then referred to and read extracts from the following cases: *Rex v. Elliott*, 9 O.L.R. 648 (distinguishing it); *Rex v. Clarke*, 9 W.L.R. 243 (distinguishing it); *Wampole & Co. v. Karn Co.*, 11 O.L.R. 619 (contending that it was decided upon a wrong principle); *Rex v. Master Plumbers and Steam Fitters Co-operative Association* (1907), 14 O.L.R. 295 (distinguishing it); and also referred to and relied on the following authorities: *The King v. Gage*, 13 Can. Crim. Cas. 415; *Ontario Salt Co. v. Merchants Salt Co.* (1871), 18 Gr. 540; *Cooke's Trade and Labour Combinations* (1898), p. 17; *Eddy on Combinations*, vol. 1, pp. 434, 469, 475, 485; *Bohn Manufacturing Co. v. Hollis* (1893), 55 N.W. Repr. 1119;

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Commonwealth v. Grinstead (1901), 111 Ky. 203; *Gibbins v. Metcalfe* (1905), 15 Man. L.R. 560; *Bagg's Case* (1616), 11 Coke 174 (98a).] Under the common law, the element of wrong-doing was a primary object—to do malicious injury to somebody else. The common law conspiracy needs have no results; it rests in intention. The statutory conspiracy is a totally different matter; it is a conspiracy which must have certain results; otherwise it is not a conspiracy at all. See secs. 496, 497, and 498 of the Code. If the defendants combine, confederate, arrange, and conspire together to protect their own interests, although it may have the result, directly or indirectly, of some one of the four consequences mentioned in sec. 498, they are not within the scope of the section. The kind of conspiracy that is arrived at is conspiracy or combination, primarily formed for the purpose of doing certain things, and if it has the effect of doing any one of these things, it is within the section; but if it is formed to do certain other things, in themselves lawful, then it does not come within the purview of the section. Here the primary object of the Guild is to take all wholesalers, not to discriminate, not to favour one more than the other, but to endeavour to get every wholesale dealer in Canada within the scope and operation of the Guilds and to make them live up to their contracts. The object of the Guilds was not to do any of the things named in the section. Because of the fixed prices, it could not do any of these: it could not enhance the price; it could not limit production; it could not limit transportation; and there is no evidence that transportation was ever interfered with, that production was ever interfered with; and there is not a single instance in twenty years that the price of any individual article was enhanced. Prices were indeed lessened by the proceedings of the Guild. The Crown must prove the commission of the offence. The Court is not to be left to draw problematical conclusions from certain statements, where the facts itself is capable of direct proof. Under the Criminal Code presumptions are to be made in certain cases, but not in this case. As to what the old common law right, in regard to the question of competition, was, we refer to *Hearn v. Griffin* (1815), 2 Chit. 407; *Jones v. North* (1875), L.R. 19 Eq. 426; *Mogul SS. Co. v. McGregor, Gow & Co.*, [1892] A.C. 25; *Taddy & Co. v. Sterious & Co.*, [1904] 1 Ch. 354; *Elliman, Sons & Co. v. Carrington & Son*, [1901] 2 Ch. 275; *Allen v. Flood*, [1898] A.C. 1;

Quinn v. Leathem, [1901] A.C. 495. The conditions of trade justify the existence of the three classes, the manufacturers, the wholesalers, and the retailers. A manufacturer cannot afford to go direct to the retailer with his single product. The wholesaler goes with the product of a hundred factories. The manufacturer has the right to employ his own agents to distribute his own goods. There is no evidence of coercion. [Counsel discussed the evidence at length.] We refer to the Customs Tariff Act, 6 & 7 Edw. VII. ch. 11, sec. 12 (D.), which shews the view taken by Parliament of a situation of this kind. As to the meaning of "unreasonable," see the Century Dictionary, Bouvier's Law Dictionary, Webster's Dictionary. There is a very large margin between reasonable and unreasonable. It is for the Court to say whether what was done here was unreasonable. The real difficulty is that men undertook to keep to prices, not shewn to be unreasonable or unjust or inordinate, and did not keep to them. The Guilds never would have been in existence if all the manufacturers, wholesalers, and retailers had been honest men. Under sub-sec. (a) of sec. 498 there is no case; no evidence to shew that the public ever suffered by the violation of that sub-section. There is no evidence of any consumer wanting to buy and not being able to get what he wanted. There is no evidence to shew that the retailer could not get what he wanted at any time at a certain price, but not at the rebate price to the wholesaler. There is nothing to shew that the production was limited. Under sub-sec. (b), as to trade and commerce, we refer again to *Gibbins v. Metcalfe*, *supra*. "Trade and commerce" are used there in their broadest and fullest sense as affecting the whole Dominion; they do not refer to the internal conduct of trade. As to sub-sec. (c), no witness has been called to prove a higher price or a smaller production, nor to prove that the arrangements between the wholesalers and manufacturers have brought about such a result. Under sub-sec. (d) it has not been shewn that the natural result of the condition of things disclosed in the evidence would operate as a violation.

Blackstock, in reply. With reference to the authorities in England and the United States cited by my learned friends, our own Court of Appeal, in *Rex v. Elliott*, *supra*, has said that they are inapplicable, in view of our statute. The case which is binding on this Court is *Rex v. Elliott*, and there is an extraordinary analogy

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between that case and this. It answers my learned friends' argument that the object of the conspiracy must, under sec. 498, be a malicious object. [Counsel also referred to some of the other cases cited, and discussed the evidence at some length.] All the arrangements of the defendants are of the most far-reaching character. The object of the statute is, as far as possible, to secure freedom of trade; that has been entirely circumvented by the operations of the defendants; and, if it were possible that these arrangements could be maintained, the statute would be rendered entirely nugatory and inoperative. However reluctantly, I am compelled to ask that these arrangements be broken up, and these restrictions placed upon trade removed.

March 7, 1910. FALCONBRIDGE, C.J.:—This is a prosecution for an alleged conspiracy connected with trade and commerce, laid under sec. 498 of the Code.

The indictment was found by a grand jury at Hamilton before me at the autumn assizes of 1907.

The persons and corporations against whom such indictment was found exercised the option given by sec. 581, and elected to be tried before me without the intervention of a jury, and by consent the venue was changed to Toronto.

Partly owing to the fact that witnesses had to be brought from great distances and from the United States, and partly because regard was necessarily had to the other engagements of myself and counsel, the case was not immediately proceeded with, but it was tried on the 21st September, 19th, 20th, 21st, 22nd, 23rd October, 11th and 12th November, 1908. The evidence was closed on the 7th January, 1909, and the argument at once proceeded and occupied three days (the 7th, 8th, and 9th). The evidence was then extended and copies made of certain exhibits, and after I became (some weeks later) finally seised of the case by the delivery to me of the papers necessary to complete the record, various circumstances of a personal nature from time to time interfered with my disposition of the case.

There are over 1,000 pages of type-written evidence. The exhibits number 112—two of them being letter-books from which hundreds of letters were read—and other individual exhibits, each

comprising in several instances bundles of 30 or 40 letters and documents.

[The Chief Justice then set out the indictment as above.]

Counsel for the Crown admitted that no case had been made out against the defendants under paragraph 1 of the indictment, corresponding to sub-sec. (a) of sec. 498 of the Code (for unduly limiting facilities for transportation, production, etc.), and that the case would have to be maintained, if at all, under the remaining charges, corresponding to sub-secs. (b), (c), and (d) of the said section.

I have, of course, always been seised of the principal features of the case, and, having carefully considered the numerous authorities cited to me and others, I have been for some time in a position to say that I had made up my mind and was prepared to render a general verdict, but I was anxious, in a case of so much importance, to give a very full and elaborate statement of the facts; and therefore there has been some delay in delivery of judgment.

The history of the Guild must be gathered from the evidence of the defendants and the letters and documents. It appears that the Wholesale Grocers' Guild had its origin in the year 1883.

Prior to the formation of any association of wholesale grocers, the conditions of the trade in tobacco, starch, and staple articles, sugar, canned goods, and matters of that kind, and cereals, are proved to have been very unsatisfactory. The wholesale grocers were making a very small profit altogether, and not even a living profit on staples. Price-cutting was prevalent. The defendants assert that it was owing to the unfortunate and unsatisfactory conditions that existed that some steps had to be taken to preserve their existence in trade.

The evils of which the wholesale grocers were complaining, and for which they sought a remedy, were that a great many lines of goods were being sold at a less price than they thought they ought to be, and business conditions were not fairly understood and enforced as the grocers thought they should be. It is sworn that the object of the Guild in seeing the manufacturers was to try and get, if possible, sufficient profit to deliver or market their goods without drawing upon the profit of other portions of the business.

The Guild's origin was due to the fact that conditions of the trade were very bad, and it was found necessary, in order to prevent

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disaster amongst those engaged in wholesale business, to meet and confer with a view of seeing what measures might be arrived at to improve such conditions.

Mr. Kittson says that what gave rise to the Guild was this: the wholesale trade came together for the purpose of forming an association for their mutual helpfulness, to educate each other as to the conditions of trade, to endeavour to promote legislation when necessary, for the purpose of consulting with regard to the standing of customers, for the general purpose of throwing light on better methods of doing business, and to increase the profit if possible.

Colonel Davidson states in his evidence that the origin of the Guild was about 1883, when Mr. Blain and he went to Montreal to arrange a tobacco price.

Mr. Blain relates that Colonel Davidson and he went to Montreal with a view of discussing the situation of the trade on the question of tobacco, and on that occasion they succeeded in making an arrangement among the wholesale grocers to sell tobacco at an advance of two cents a pound. This arrangement was subsequently made between most of the wholesale grocers.

The next move was in the reduction of time terms given to the trade. Shortly afterwards they devoted their attention to the sugar business. This was the first time any united action had been taken by the wholesale grocers to see what could be done with the refiners. Negotiations with the refiners extended over three or four years, and finally resulted in the wholesalers getting a discount on the price which the refiners were charging, becoming able thereby to make a little profit on sales.

Mr. Blain further says that the bone of contention between the wholesalers and refiners was that the refiners could not afford the wholesalers a profit between the wholesale and retail trade; and the wholesalers' contention, on the other hand, was that they could not exist without it. The refiners contended that they could not sell the goods themselves for the profit they were getting. In short, the wholesalers wanted more profit on sugar from the refiners; the price to the retail trade was to remain the same.

Mr. Blain says that the next move was further to reduce the terms on sugar to the retail trade. Sugar was reduced to thirty days, and other goods gradually came to be put on a thirty days' basis, but these negotiations extended over quite a series of years.

Colonel Davidson says that, after his trip to Montreal with Mr. Blain, the wholesalers met occasionally and discussed matters, but for some time there was no regular constitution and no by-laws or anything of the kind.

Mr. Beckett in his evidence states that the organisation was at first rather a "go-as-you-please" affair. There was no system about it, and only a part of the wholesalers appear to have acted in the conference in the early stages. Some took no interest in the matter. The wholesale grocers had what they called a Guild, but they did not even have a list of the members. No Guild member could tell or knew who the other Guild members were, and apparently they had no opportunity of knowing from any records or books of the so-called Guild.

Mr. Blain says that the Guild did not have many meetings during the presidency of Mr. Gillard, and that the Guild was never organised upon what might be called a regular system until 1903. Mr. Gillard seems to have acted largely on his own responsibility, and he did not consult with or represent the Guild officially.

Mr. Beckett says that, prior to 1903, there were no funds in the possession of the Guild, and no membership fees. That Mr. Gillard or any one else who was active in the Guild's interests paid his own expenses and that the Guild did not contribute anything towards them.

Colonel Davidson says that the Dominion Guild was the outcome of the local Guilds, but they were not at that time called local Guilds, but local associations, and then afterwards Provincial Guilds were formed.

Mr. Cook says that the first and only by-laws of the Guild were adopted on the 22nd January, 1903; that the Dominion Guild consisted of nearly all the wholesale grocers in the Dominion; that there are also provincial and local associations. Each city where there are wholesale grocers has a Guild, each Province has a Guild. By becoming a member of the local Guilds, members also become eligible for the Dominion Guild. A member in good standing on the 31st December, 1902, of the local Guilds was made member of the Dominion Guild.

Mr. Blain says that the object of forming a constitution was to have a proper system of looking after the wholesale grocery business, and to have it properly organised. The condition of membership

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in the Guild was that the applicant must be a wholesale grocer. The Guild was formed for the purpose of giving to its members a reasonable profit for handling the trade in staple commodities of general consumption.

Colonel Davidson says that the Guild was not formed for the purpose of enhancing the price to the retailer or consumer, but the Guild had the reverse effect; that it had not destroyed competition nor enhanced the price of any article, but, on the contrary, it had reduced the price, and that there is no difference between the method of conducting business now under the Guild and as it was conducted thirty years ago before any Guild was thought of.

Mr. Beckett says that the Guild was not formed at all for the purpose of regulating prices; that the method adopted was to prevent the demoralisation of the trade continuing, and to remedy existing grievances.

Mr. Kittson says that the Guild simply endeavoured to get the manufacturers to fix the price of their goods independently of the grocers, and the wholesale people then asked the manufacturer to pay the wholesale grocer so much out of the price as his remuneration for handling the goods.

Mr. Cook in his evidence says that the loss of membership was the only penalty known in the Dominion Wholesale Grocers' Guild.

The history and proceedings of the Guild appear in the exhibits filed---the more important being above set forth.

This prosecution is under the statute, but it is instructive to consider the common law on the subject as defined by several leading cases and authorities:—

“The doctrine that certain contracts are void as being in restraint of trade is founded upon considerations of public policy. According to a well-known dictum of Mr. Justice Burrough, ‘public policy is a very unruly horse, and when once you get astride it you never know where it will carry you.’ . . . To determine what is and what is not prejudicial to the interests of trade requires very exceptional insight into economic conditions and the nature of commercial transactions, and consequently, as the late Mr. Justice Cave once remarked, ‘Judges are more to be trusted as interpreters of the law than as expounders of what is called public policy:’”
Jolly on Contracts in Restraint of Trade, 2nd ed., pp. 1 and 2.

In *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*,

[1894] A.C. 535, several very eminent law Lords discussed the question of contracts in restraint of trade, and pointed out that "the course of policy pursued by any country in relation to, and for promoting the interests of, its commerce must, as time advances and its commerce thrives, undergo change and development from various causes which are altogether independent of the action of its Courts:" *per* Lord Watson at p. 553. And Lord Ashbourne, at p. 556, says: "The cases that have been referred to are interesting and important as shewing the history, growth, and development of an important branch of our law. In considering them it is necessary to bear in mind the vast advances that have since the reign of Queen Elizabeth taken place in science, inventions, political institutions, commerce, and the intercourse of nations. Telegraphs, postal systems, railways, steam, have brought all parts of the world into touch. Communication has become easy, rapid, and cheap. Commerce has grown with our growth, and trade is ever finding new outlets and methods that cannot be circumscribed by areas or narrowed by the municipal laws of any country. It is not surprising to note that our laws have been also expanded, and that legal principles have been applied and developed so as to suit the exigencies of the age in which we live."

In *Ontario Salt Co. v. Merchants Salt Co.*, 18 Gr. 540, that eminent judge, Strong, then Vice-Chancellor, delivered an elaborate judgment, the bill having been demurred to for want of equity: the head-note is as follows: "Several incorporated companies and individuals, engaged in the manufacture and sale of salt, entered into an agreement, whereby it was stipulated that the several parties agreed to combine and amalgamate under the name of 'The Canadian Salt Association,' for the purpose of successfully working the business of salt manufacturing and to further develope and extend the same, and which provided that all the parties to it should sell all salt manufactured by them through the trustees of the association, and should sell none except through the trustees: *Held*, on demurrer, that this agreement was not void as contrary to public policy or as tending to a monopoly or being in undue restraint of trade; that it was not *ultra vires* of such of the contracting parties as were incorporated companies, but was such in its nature as the Court would enforce." At p. 542 he says: "It is out of the question to say that the agreement which is the subject of this bill had for

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its object the creation of a monopoly, inasmuch as it appears from the bill that the plaintiffs and defendants are not the only persons engaged in the production of salt in this Province, and therefore the trade in salt produced here by other persons, and in salt imported from abroad, will remain unaffected by the agreement, except in so far as prices may be possibly influenced by it. The objection on this head is rather that the agreement has for its object the raising the price of salt, and for that reason is illegal, as constituting the old common law offence of 'engrossing,' or at least is void as being against public policy." And on p. 543: "Were I to hold this agreement void on any such ground, I should be laying down a rule, which, if applied, would cause great inconvenience in trade, and one the necessity for which would at this day be discountenanced by all public and scientific opinion."

So that it would be dangerous to accept as a settled doctrine of political economy or proposition of law, that, under any and all conditions and at all times, every man or corporation should be declared to have an absolute and inalienable right to buy and sell, trade or barter, with any other person or corporation, without restriction as to quantity or price.

The case of *Rex v. Elliott*, 9 O.L.R. 648, has been strongly relied on by the Crown. There the defendant was president of, and took an active interest in the conduct of affairs of, the Ontario Coal Association. That association was not formed so as to include a whole class. Dealers in Ontario could not become members of the association as of right, and at least one applicant had been refused because the state of the coal business "would not admit of additional competition." The main object of the association was to restrict and confine the sale of coal by retail to its own members, and to prevent any one else from obtaining it for that purpose from the operators and shippers. Here the endeavour is to protect the interest and the welfare of the wholesale grocers of Canada, whether they are members of the Guild or not. Article 5 of the constitution of the Ontario Coal Association plainly contemplated the fixing of prices by the local organisation; so that in the two particulars that case is entirely different from the present one, *viz.*, the legitimate coal dealer could not get admission to the coal association, whereas here the Guilds have invited the membership of legitimate wholesale dealers from the beginning; and, secondly, the price has in all cases here been fixed by the manufacturers themselves.

In the case of *Rex v. Master Plumbers' and Steam Fitters' Co-operative Association*, 14 O.L.R. 295, persons in the trade who were not members of the Plumbers and Steamfitters Association could not buy supplies except at an advance of from 20 to 25 per cent.—in other words, men who were in the same position as the members, either could not buy at all, or, if they could buy, could only do so at an advanced rate. In his judgment in that case, p. 300, Clute, J., says: "We find that that system was endeavoured to be rigidly carried out. Of course, for the purposes here, it is not necessary that it should be shewn that it was carried out or that it was put in force—the mere combination was sufficient; but as a matter of fact it was so enforced, and so rigidly enforced, that numbers of plumbers who were not members of the association found it impossible to obtain goods except by a roundabout way through other members of the association or by importing them from the United States." And at p. 302: "During all this time I find that the existence of this combination continued, that it was being observed as well as it could be under the circumstances, that both parties relied upon it, and that while making a pretence, for use at Ottawa, that they were selling to every one equally, as a matter of fact the very firms that were engaged in this business, and who formed the association of plumbers' supplies, were refusing applications of persons who sought to purchase their goods because they were not members of the Plumbers' Association." And then an ingenious scheme was devised whereby, through the medium of a supply association, it was thought that the scheme could be carried out without danger.

In the present case any wholesale merchant could buy exactly on the same terms as members of the association. I note on p. 309 an observation of Osler, J.A., which applies to some of the evidence given in this case: "The prosecution, however, went very far afield, introducing evidence, which comprises the bulk of the record, of unlawful acts committed by individuals, members of the old unincorporated associations, years before these defendants came into existence. This in my opinion was absolutely wrong . . ." This remark applies very specially to the indiscretions of some individuals, notably of the late Mr. Gillard, who was badly afflicted with *cacœthes scribendi*; and the defendant Beckett has more than a slight attack of the same malady. In this connection I

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may cite the extremely fair and reasonable pronouncement of the senior counsel for the prosecution: "I apprehend that I am within the judgment of your Lordship in saying that if these arrangements, as we have them exposed in evidence now, were on the whole reasonable, satisfactory, and free in the main from objectionable features, your Lordship would not think it fair or reasonable that these defendants should be pursued into some details of their conduct which seem perhaps more or less objectionable, but, after all said and done, which are perhaps out of harmony with the general idea which they have in their mind." And again: "Now, my Lord, I shall only conclude as I commenced by saying that if your Lordship reaches the conclusion, on this evidence, that the general arrangements made by these defendants are on the whole free from objection, informed by a proper spirit, conceived with proper idea, and aimed at the accomplishment of proper results, then on the part of the Crown I should not desire to see some details of their conduct which are objectionable fastened upon for the purpose of finding them guilty of the charges that are preferred against them."

In *Mogul S.S. Co. v. McGregor, Gow & Co.*, [1892] A.C. 25, Lord Halsbury says at p. 36: "There are doubtless to be found phrases in the evidence which, taken by themselves, might be supposed to mean that the associated traders were actuated by a desire to inflict malicious injury upon their rivals; but when one analyses what is the real meaning of such phrases it is manifest that all that is intended to be implied by them is that any rival trading which shall be started against the association will be rendered unprofitable by the more favourable terms, that is to say, the reduced freights, discounts, and the like, which will be given to customers who will exclusively trade with the associated body."

And in *Allen v. Flood*, [1898] A.C. 1, Lord Herschell says, at p. 138: "I now proceed to consider on principle the proposition advanced by the respondents, the alleged authorities for which I have been discussing. I do not doubt that everyone has a right to pursue his trade or employment without 'molestation' or 'obstruction' if those terms are used to imply some act in itself wrongful. This is only a branch of a much wider proposition, namely, that everyone has a right to do any lawful act he pleases without molestation or obstruction. If it be intended to assert that an act not otherwise wrongful always becomes so if it interferes with

another's trade or employment, and needs to be excused or justified, I say that such a proposition in my opinion has no solid foundation in reason to rest upon."

The case of *Wampole & Co. v. Karn Co.*, 11 O.L.R. 619, deals with a proprietary article, and it is a civil action. It does not appear that any criminal prosecution was founded on it. See *Quinn v. Leathem*, [1901] A.C. 495, 506: "Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found." And at p. 514: "In *Allen v. Flood* the purpose of the defendant was by the acts complained of to promote his own trade interest, which it was held he was entitled to do, although injurious to his competitors."

The case of *The King v. Clarke*, 14 Can. Crim. Cas. 46, and, in appeal, 57, was that of an association composed of retail dealers in lumber, and they assumed to fix the price. Eligibility to membership was finally determined by the directors, not as here by the mere fact of being a wholesale dealer, and retailers who dealt directly with the consumers assumed to decree a monopoly, and to fix the price at which the monopoly should sell.

In the case of *The King v. Gage*, 13 Can. Crim. Cas. 415, the head-note is as follows: "1. A conspiracy 'to restrain or injure trade' in relation to any commodity under Code, sec. 498, sub-sec. (b), must from the context be taken to refer to 'undue' restraints of trade such as malicious restraints or those not justified by any personal interest for the protection of which the trade arrangement is made. 2. Traders may legally organise for the protection and advancement of their common interests, provided that the interests of the public are not to be unduly impaired. 3. A regulation of a grain buyers' association which required that its members on purchasing wheat from producers should pay therefor not more nor less than one cent per bushel below the export market price, and so allow a fixed profit of one cent per bushel on the trade done by members of the association on its own exchange or market, does not constitute an undue restraint of trade, if it appears that such profit is a fair and reasonable one." That case was tried by Phippen, J.A., who adopted the view taken by Killam, C.J., in *Gibbins v.*

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Metcalf, 15 Man. L.R. 583, that sub-sec. (b) relates to those restraints which are not justified by any personal interests of the contracting parties, but which are mere malicious restraints, unconnected with any business relations of the accused. It was held in that case that the combination which the defendants there had entered into, though resulting in damage to some person or persons, is actionable only in cases where its object is unlawful, or where, if lawful, such object is obtained by unlawful means.

In *Eddy on Combinations*, vol. 1, sec. 556, the author says: "Every combination, whether a partnership, an association, a corporation, or a combination of these various factors, is presumed legal until the contrary is shewn by affirmative evidence. . . . In accordance with the views hereinbefore expressed, it is submitted that the correct doctrine is that all agreements underlying combinations are presumed valid unless they shew upon their face that the object of the agreement is to do that which is unlawful, injurious or oppressive. However, the presumption of validity which attaches to an agreement apparently legal in its terms and upon its face may be overcome by proof that, as a matter of fact, the agreement was entered into and the combination formed for unlawful, injurious, or oppressive objects." In sec. 560 he says: "The right of a combination of dealers to advance their own interests by mutually agreeing that they would not deal with any manufacturer or wholesale dealer who should sell directly to customers has been broadly upheld."

For this contention the author cites *Bohn Manufacturing Co. v. Hollis*, 54 Minn. 223, 55 N.W.Repr. 1119. I cite the following extracts from the judgment of Mitchell, J., in that case, p. 1120: "The case presents one phase of a subject which is likely to be one of the most important and difficult which will confront the Courts during the next quarter of a century. This is the age of associations and unions, in all departments of labour and business, for purposes of mutual benefit and protection. Confined to proper limits, both as to end and means, they are not only lawful, but laudable. Carried beyond those limits, they are liable to become dangerous agencies for wrong and oppression. Beyond what limits these associations or combinations cannot go, without interfering with the legal rights of others, is the problem which, in various phases, the Courts will doubtless be frequently

to pass upon. There is, perhaps, danger that, influenced by such terms of illusive meaning as 'monopolies,' 'trusts,' 'strikes,' and the like, they may be led to transcend the limits of their jurisdiction, and, like the Court of King's Bench in *Bagg's Case*, 11 Coke 174 (98a), assume that, on general principles, they have authority to correct or reform everything which they may deem wrong, or, as Lord Ellesmere puts it, 'to manage the state.' But whatever doubts or difficulties may arise in other cases, presenting other phases of the general subject involved here, it seems to us that there can be none on the facts of the present case. Both the affidavits and brief in behalf of the plaintiff indulge in a great deal of strong, and even exaggerated, assertion, and in many words and expressions of very indefinite and illusive meaning, such as 'wreck,' 'coerce,' 'extort,' 'conspiracy,' 'monopoly,' 'drive out of business,' and the like." (This sounds very like the present case.) "This looks very formidable, but in law, as well as in mathematics, it simplifies things very much to reduce them to their lowest terms. It is conceded that retail lumber yards in the various cities, towns, and villages are not only a public convenience, but a public necessity; also, that, to enable the owners to maintain these yards, they must sell their lumber at a reasonable profit. It also goes without saying that to have manufacturers or wholesale dealers sell at retail, directly to consumers, in the territory upon which the retail dealer depends for his customers, injuriously affects and demoralises his trade. This is so well recognised as a rule of trade, in every department, that generally wholesale dealers refrain from selling at retail within the territory from which their customers obtain their trade. Now, when reduced to its ultimate analysis, all that the retail lumber dealers, in this case, have done, is to form an association to protect themselves from sales by wholesale dealers or manufacturers, directly to consumers or other non-dealers, at points where a member of the association is engaged in the retail business. The means adopted to effect this object are simply these: they agree among themselves that they will not deal with any wholesale dealer or manufacturer who sells directly to customers, not dealers, at a point where a member of the association is doing business, and provide for notice being given to all their members whenever a wholesale dealer or manufacturer makes any such sale. That is the head and front of the defendants' offence."

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I refer to the case of *Commonwealth v. Grinstead* (1900), 108 Ky. 59, affirmed in appeal in 1901, 111 Ky. 203, where it was held that an agreement by one who buys goods from a manufacturer, not to resell them for less than a certain price, does not violate sec. 3915, Kentucky statutes. The Kentucky statute in question provided that "any corporation or individual who shall become a member of, or a party to, or in any way interested in any pool, trust, combination or agreement, for the purpose of regulating the price or limiting the production of any article of property, shall be deemed guilty," etc.

There is a decision of the Supreme Court of California, sitting in banc, in the case of *Grogan v. Chaffee* (1909), New York Journal of Commerce and Commercial Bulletin of the 23rd March, 1909, wherein it is held that fixed prices are not in restraint of trade. The Court sustains the manufacturer and holds that price-cutters are liable if they do not maintain prices fixed by the maker of goods. I cite the following extracts: "The tendency of the modern decisions has been to view with greater liberality contracts claimed to be in restraint of trade. It is not every limitation on absolute freedom that is prohibited. As is held by the Supreme Court of the United States in *Gibbs v. Consolidated Gas Co. of Baltimore* (1889), 130 U.S. 396, 409, 'Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other requires, the contract may be sustained. The question is whether, under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is, or is not, unreasonable.' So, in *People's Gaslight and Coke Co. v. Chicago Gaslight and Coke Co.* (1886), 20 Ill. App. 473, 492, the Court says: 'The tendency of the Courts is to regard contracts in partial restraint of competition with less disfavour than formerly, and the strictness of the ancient rule has been greatly modified by the modern cases.' . . . It is suggested rather than argued by respondent that the agreement relied on by appellant is unlawful under the provisions of the statute of 1907, entitled, 'An Act to define trusts and to provide for criminal penalties and civil damages, and punishment of corporations, persons, firms and associations, or persons connected with them, and to promote free competition in commerce and all classes of business in this State:' approved March 23, 1907, commonly known as the Cartwright Act."

In the present case there has been no evidence of the enhancing of prices—no complaint by any consumer—no complaint by any retail dealer, but rather approbation.

It is conceded that the proper method of distribution of goods from the manufacturer is through the wholesale dealer to the retailer and then to the consumer, because this is the most economical method. For, if the manufacturer attempts to deal directly with the consumer, or even with the retailer, he must, in a country like Canada, sparsely settled and of enormous area, maintain a staff of travellers and also establish depots for his goods at important points. These are great outlets of expenditure, for the traveller carrying only one line of samples gets possibly as large a salary, and certainly spends as much in travelling expenses, as the traveller for a wholesale house, who sells, we are told, three or four hundred different articles. This is one reason why the wholesaler undertaking the sole distribution gets a larger profit, and yet the price is not enhanced to the consumer.

The various cases of alleged oppression and “driving out of trade” of persons who, either openly, or by some ingenious device, aim to belong to the wholesale trade, and at the same time sell at retail, are thus easily understood. If this system were to be practised, it would injuriously affect and demoralise the trade not only of the wholesaler but of the retailer, and the consumer would certainly not be the better off in the long run.

The same remarks apply to the efforts made to put a stop to the “cutting” of prices.

There was some complaint about the system known as the “equalization of rates,” it being contended that it bore unequally and oppressively as against certain towns or districts. This statement was entirely disproved, and it was shewn that the “equalization” was based strictly upon the freight rates of the different railways, so that the retail merchants got their goods at the different points at practically the same prices.

I find the facts then to be as follows:—

1. The defendants have not, nor have any of them, intended to violate the law.

2. Nor have they, nor have any of them, intended maliciously to injure any persons, firms, or corporations, nor to compass any restraint of trade unconnected with their own business relations.

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3. They have been actuated by a *bonâ fide* desire to protect their own interests and those of the wholesale grocery trade in general.

As far as intention and good faith or the want of it are elements in the offence with which they are charged, the evidence is entirely in their favour.

Have they then been guilty of a technical breach of law?

This question is answered by the citations which I have given above and which cover every branch of the case.

I therefore say that the defendants are not, nor is any of them, guilty as charged.

There are minor matters as to which I, sitting as a jury, give the defendants (as I am bound to do) the benefit of the doubt; and as to which I warn the defendants and those in like case to be careful, *e.g.*, as to alleged efforts to coerce wholesale dealers into joining the Guild.

It is of the essence of the innocence of the defendants that the privileges which they seek to enjoy should be extended to all persons and corporations who are strictly wholesalers, whether they choose to join the Guild or not.

[IN CHAMBERS.]

GAGNE V. RAINY RIVER LUMBER CO.

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March 12.

*Parties—Third Party Procedure—Con. Rule 209—Relief over—Tort—
Measure of Damages—Remoteness.*

In an action for damages arising from the plaintiff's business as a river ferryman being interfered with by the defendants' logs blocking the river, the defendants claimed relief over against a power company, alleging that at a point below the plaintiff's ferry docks the power company had erected a dam and power plant in such a manner that driving logs down the river was impeded, and that the sluiceway provided by the power company in their dam was inadequate for the purposes intended. The defendants did not claim a right against the third parties by reason of breach of any express or implied contract:—

Held, assuming that the power company were guilty of tort in building their dam and impeding the flow of the waters of the river, that Con. Rule 209 does not apply to such a case, but is confined to cases where the right to relief over is given by law in consequence of a breach of contract between the third party and the defendant, or is a right given by statute.

But, even if the Rule were applicable to claims arising out of tort, the damages suffered by the plaintiff were not the same that the defendants would recover against the third parties, if entitled to recover anything; and again the Rule did not apply.

Miller v. Sarnia Gas Co. (1900), 2 O.L.R. 546, followed.

Semble, that the damages alleged by the plaintiff were too remote.

APPEAL by the Minnesota and Ontario Power Company Limited from an order of the Local Judge at Kenora dismissing a motion by the appellants to set aside a third party notice served by the defendants on the appellants, under Rule 209.*

February 15. The appeal was heard by TEETZEL, J., in Chambers.

Featherston Aylesworth, for the appellants.

A. E. Knox, for the defendants.

March 12. TEETZEL, J.:—The question is whether the facts disclosed in the affidavit upon which leave was given to serve the notice bring the case within the Rule.

Those facts are as follows. The plaintiff is the holder of a license entitling him to operate a ferry between the town of Fort Francis, in Ontario, and two towns in Minnesota, on the opposite banks

* 209. Where a defendant claims to be entitled to contribution or indemnity from or any other relief over against any person not a party to the action, he may, by leave of the Court or a Judge, issue a notice (hereinafter called the third party notice), which shall be sealed in the same manner as the writ of summons, and shall state the nature and grounds of the claim and be according to Form No. 49.

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of the Rainy river. The said river is a navigable stream, and the international boundary between the United States and Canada. The defendants are a lumbering company, and were engaged in driving or floating a large quantity of logs down the river at the points where the plaintiff is entitled to operate his ferry, and the action is for damages arising from the plaintiff's business as ferryman being interfered with by the defendants' logs, the plaintiff alleging that the river was so filled and blocked with logs that navigation was impossible. The defendants allege that at a point below the plaintiff's ferry docks the third parties have erected a dam and power plant in such a manner that driving logs down the river is impeded, and that the sluiceway provided by the third parties in their dam is inadequate for the purposes intended, and that, if the plaintiff was impeded in the operation of the ferry, it was by reason of the erection and construction of the dam and power plant by the third parties, and the inadequacy of the means provided for floating logs past the sluice or dam.

The procedure under the Rule is confined to claims for: (a) contribution over; (b) indemnity over; and (c) other relief over against the third party.

It was not contended on the argument that the third party notice could be supported on the ground that the defendants were entitled to contribution or indemnity, but that the case comes within that part of the Rule providing for "other relief over."

Prior to 1895, the Rule was the same as the English Rule, and was limited to claims for contribution or indemnity. In that year, it was held as to the provision for indemnity, in *Payne v. Coughell* (1895), 17 P.R. 39, following the English decisions, that the Rule only applied "to claims for indemnity as such, either at law or in equity, and did not apply to a right to damages arising from breach of contract, the latter being a right given by law in consequence of the breach of a contract between the parties, while the former is given by the contract itself."

The Rule was subsequently amended by inserting the words "or any other relief over against."

As was suggested in *Confederation Life Association v. Labatt* (1898), 18 P.R. 266, the amendment was probably made in con-

sequence of *Payne v. Coughell* and other cases shewing the former narrow compass of the Rule.

In *Confederation Life Association v. Labatt*, which was an action for conversion of goods, the defendant said that he purchased the goods from the third parties in good faith and upon their warranty of their title to them, and that, if the plaintiffs succeeded against him, he desired relief over against the third parties, so that he might sustain no loss; and it was held that the words "any other relief over" in Rule 209 were wide enough to include such a claim by the defendant against his vendor. At p. 269, Street, J., discusses the object of the Rule as amended, and points out that it avoids the injustice that might arise if the defendant were driven to bring an action against his vendors, and was unable to prove in the second action that he had properly paid the damages to the plaintiffs in the first action, as by the amended Rule he was enabled to bind his vendor by the result of the proceedings in the first action, and, having done so, to recover from him in the same action such relief over as he might shew himself entitled to.

The defendants do not claim a right against the third parties by reason of breach of any express or implied contract, and I think the material falls short of charging tortious acts against the defendants, because, for all that appears, the third parties may have erected their dam and sluiceway within their legal rights.

Assuming, however, that the third parties are guilty of tort in building their dam and impeding the flow of the waters of the river, no case was cited, nor have I been able to find any case, where a claim for relief over has been allowed to be made by a defendant against a third party in consequence of a tort committed by a third party, other than cases provided for under sec. 609 of the Consolidated Municipal Act, 1903. After perusing many of the cases which have been decided, both before and since the Rule was amended, I am of opinion that the amended Rule does not extend to such a case as this, but to cases where the right to relief over is given by law in consequence of a breach of contract between the third party and the defendant, either express or implied, or is a right given by statute.

Even assuming that the procedure is applicable to claims arising out of tort, how can it be said that the damages which

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the plaintiff has suffered by reason of the combined acts of the defendants and third parties are the measure of damages the defendants would recover, if entitled to recover anything, from the third parties? And, if the measure of damages does not correspond—and I do not see how it is possible it could in a case like this—*Miller v. Sarnia Gas Co.* (1900), 2 O.L.R. 546, is a complete bar to the defendants' right to bring in the third parties. In that case it was held that the third party procedure is only applicable where the defendant is, if liable to the plaintiff, entitled to recover against the third party the very damages which the plaintiff seeks to recover against him.

Not only does this test defeat the defendants' right, but I should doubt whether any damages which the plaintiff may recover against the defendants are not too remote, for not coming within the rule that in an action of tort such damages are recoverable only as are the immediate consequence of, *i.e.*, such as would in the ordinary course of events naturally flow from, the unauthorised act or omission.

However, in the view I take of the other objections, it is not necessary to determine this point.

The appeal must, therefore, be allowed, and the third party notice be set aside, with costs.

[BRITTON, J.]

RE RAYCRAFT.

1910

March 14.

Quieting Titles Act—Certificate of Title Free from Mortgage—Mortgagee not Heard of for Long Period—Presumption of Death—Claim not Made by Mortgagee or Heirs—Suggestion of Claim of Crown by Escheat—Statute of Limitations—Crown Grant after Mortgage and Presumption of Death—Absence of Reservation—Estoppel.

Upon the investigation of the petitioner's title to land pursuant to a petition under the Quieting Titles Act, it appeared that the petitioner's grantor, on the 2nd February, 1877, mortgaged the land for \$900 to J. I., who had not been heard from, or heard of as being alive, since a date prior to the 2nd February, 1878, and nothing had been paid on the mortgage since that date. In the proceedings under the Act no claim was made on behalf of J. I. or by any one under the mortgage. The Crown, alleging that J. I. died intestate and without heirs, and suggesting a possibility of asserting a right within sixty years from the time the cause of action arose, but not proving or attempting to prove any claim, asked that the petitioner's certificate of title should be expressly made subject to the right of the Crown to the mortgage moneys:—

Held, that under the Act the Crown was to be treated as an individual, and the rights of the Crown as the rights of an individual; the alleged possible right of the Crown was that J. I. may have died intestate and without heirs; that right, if it existed, could as well be established now as later, because, to establish it, J. I. must have died before the 2nd February, 1896. The Crown, in asserting a claim by escheat, could not rely solely on the presumption of J. I.'s death; intestacy and death without leaving heirs would require to be proved.

Held, also, that, the Crown having granted the land to the petitioner's grantor in 1890, without any reservation of its right to the mortgage moneys or to the land, the mortgage, as between the Crown and its grantee, was cut out by the grant; and the petitioner, being a purchaser for value, took free from the mortgage.

The petitioner was therefore entitled to a certificate free from the suggested claim of the Crown.

APPEALS by the Attorney-General for Ontario from the report of the Local Master at Stratford in a matter under the Quieting Titles Act, R.S.O. 1897, ch. 135, and from the finding of the Inspector of Titles, under the Act, that Thomas Raycraft, the petitioner, had shewn himself entitled to a certificate of title to the south part of the east half of lot 4 in the 1st concession of the township of Mornington.

Consolidated Rules 991-1014 provide for the procedure to be followed where a petition for an investigation of title is filed under the Quieting Titles Act.

Under Rule 995 the petition in this case was indorsed to be referred to the Local Master at Stratford, and the investigation of the petitioner's title was made by him.

The proceedings taken are set out in the judgment.

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February 28. The appeals were heard by BRITTON, J., in the Weekly Court.

E. Bayly, K.C., for the Crown.

R. U. McPherson, for the petitioner.

March 14. BRITTON, J.:—On the 24th November, 1906, Thomas Raycraft filed his petition asking for investigation and a declaration of his title under the Quieting Titles Act.

The matter was referred to the Local Master at Stratford, who, having made all necessary inquiries, made his report on the 10th April, 1907.

In this report the Master mentions a mortgage upon the said land, given by James Raycraft, the grantor of the above named Thomas Raycraft, in February, 1877, to one John Irwin, for \$900.

After making the report, the Local Master's attention was called to the fact that there might possibly be an escheat to the Crown of the money in the mortgage mentioned, or the mortgaged land. The Master thereupon notified the Attorney-General for the Province of Ontario, and at a later day, pursuant to notice, all the parties, including counsel for the Attorney-General, attended.

No evidence was offered on behalf of the Crown proving any claim to the mortgage money or any part thereof; and, thereupon, the Local Master on the 21st November, 1908, reported and certified as follows:—

“That on the 10th day of April, 1907, I forwarded my findings to Mr. George S. Holmsted, the Inspector of Titles, in the way of a report, which was acknowledged by him on the 12th day of April following.

“That, in consequence of the possibility of there being an escheat to the Crown of the mortgage moneys referred to in the second paragraph of said report, I subsequently, at the request of the solicitors for the petitioner, caused to be served upon the Attorney-General for the Province of Ontario a notice apprising him of this fact, and fixed a day for the Crown to be represented at my office at the court house, Stratford, and thereupon counsel did appear and claimed to represent the Crown, and asked an adjournment, and thereupon an adjournment was granted to a later day, by and with the consent of all parties, and upon such

later day all parties appeared, including counsel for the Attorney-General for the Province of Ontario, when the said last named counsel stated that he had no evidence to offer on behalf of the Crown proving any claim to the said mortgage moneys or any part thereof on behalf of the Crown.

"I therefore further certify that there has not appeared before me at any time any contestant in regard to the title to the said lands or to any incumbrance or incumbrances that there may appear to be thereon, and on the evidence I find that the Crown has no title or interest in the lands in question herein.

"All of which is duly certified to the Inspector of Titles."

On the 5th February, 1909, the report of the Local Master was filed in the Central Office at Osgoode Hall, Toronto.

The matter seems to have stood until the 14th December, 1909, when Thomas Raycraft applied to the High Court of Justice for a certificate of title to the above property. It was then again taken up by the Local Master, and he gave notice that, if any claim, it must be filed with the Local Master at Stratford and a copy served upon Thomas Raycraft or his solicitors, Smith & Steele, at Stratford, on or before the 17th January, 1910.

On the 25th January, 1910, the Master in Chambers, upon the application of the Attorney-General for Ontario, made an order extending the time for appealing from the report of the Local Master at Stratford until the 1st March, 1910.

On the 28th January, 1910, notices of appeal were given by the Attorney-General for Ontario: (1) of an appeal from the report of the Local Master at Stratford; and (2) from the certificate of the Inspector of Titles under the Quieting Titles Act.

If any certificate was actually made or signed by the Inspector, I do not find it with the papers before me.*

An appeal lies from the order or decision of the Inspector, if he has made any: see Con. Rule 1013.

An appeal may be taken from the report of the Local Master at Stratford: see Con. Rules 767-771.

I shall not give effect to any of the objections—called technical—raised, but will dispose of both appeals on what I regard as the merits.

* The Inspector's finding that the petitioner had shewn himself entitled to a certificate of title was embodied in a memorandum at the foot of the petition: Con. Rule 1008.

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The Crown asks that the certificate of title be subject to the rights of the Crown to the land. The Crown, though called upon to do so, will not attempt to prove any claim. Its position is, that, if the mortgagee of this land, John Irwin, died intestate and without heirs, there is a claim on the part of the Crown; that this claim is not barred by any statute of limitations; and so the Crown is not bound to prove it, in these proceedings; and that the certificate of title, if issued, should be expressly made subject to the right of the Crown under the mortgage mentioned.

I do not think so.

By sec. 25 of the Quieting Titles Act, every claim of title is made subject to certain qualifications and exceptions therein mentioned, unless the petition for investigation alleges the contrary, and, if the petitioner desires the certificate to declare the title to be free from the said particulars, or any of them, the petition shall so state, and the investigation shall proceed accordingly. Then, by sec. 29, the certificate of title, when so signed, sealed, and registered, shall be conclusive . . . from the day of the date of the certificate as regards His Majesty and all persons whatsoever, subject only . . .

Under this Act the Crown is to be treated as an individual, and the rights of the Crown as the rights of individuals. The alleged possible right of the Crown is that John Irwin may have died intestate and without heirs. That right, if it exists, can as well be established now as later, because to establish it John Irwin must, in any possible view of this case, have died before the 2nd February, 1896.

The mortgage from James Raycraft to John Irwin is dated the 2nd February, 1877; the first instalment became due on the 2nd February, 1878.

Assume, merely for argument, that the payment to one William Kerr was a valid payment on the mortgage; then the next instalment fell due on the 2nd February, 1879. This was not paid, and nothing has been paid since, and John Irwin, so far as appears, has not been heard from, or heard of as being alive, since a date prior to the 2nd February, 1878.

If John Irwin was not, in fact, dead on the 2nd February, 1896—putting that as the longest possible period required to bar him or his heirs, if any—there could be no claim on the part of the

Crown to this land or the mortgage money. But the Crown's possible case is based upon the death of John Irwin on or prior to the 2nd February, 1885. He has not been heard from since the 2nd February, 1878, or before that date.

The Crown, in asserting a claim by escheat, cannot rely solely upon the presumption of Irwin's death. There is no presumption that John Irwin died on any particular day within the seven years, or that he died without heirs. The presumption would be that he left heirs. The presumption would be sufficient to establish death, but intestacy and death without leaving heirs would require to be proved.

Why is the Crown not as well able to establish that now, if a fact, as it may be at any time later, and, if not able, why should the Crown be in any other or better position under the Act than an individual?

It would not, as I view it, be any ground for an individual mortgagee to refuse to prove his claim in quieting title proceedings that his mortgage, although past due, was not barred by the Statute of Limitations. An opportunity should be given to a person claiming to be a mortgagee to establish his right. Ample opportunity was, in this case, given to the Crown to establish its succession to the rights of a mortgagee. As the Crown was not in a position to assert its right, and did not, but merely suggested a possibility of being able to do so within sixty years from the time the cause of action arose to the Crown, that, in my opinion, will not do. The Crown is not entitled, any more than an individual would be, to tie up, and prevent alienation of, this land, for any such term definite or indefinite, for the alleged reason.

Suppose this case. A. is indebted to B., who died intestate after the debt became due. No heirs appearing or claiming, the Crown took possession of B.'s assets, and did not ask for or obtain letters of administration. Then A. died. In the administration of A.'s estate the Crown is asked to come in and prove its right to recover the debt; but the Crown refuses to do so, contending that it may prove at any time until barred by the Statute of Limitations. Would such a contention prevent the complete winding-up of A.'s estate within the time otherwise allowed? I think not. The case seems to me somewhat analogous. The statute as to quieting titles has placed the Crown in that position that the claim must be proved, or it may be barred.

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There is another objection to the Crown's claim. As I have said, the presumption is that John Irwin died prior to the 2nd February, 1885. The Crown's right, the cause of action, if any, arose upon Irwin's death. At that time the title to the mortgaged land was in the Crown, and on the 25th October, 1890, was granted under the great seal to James Raycraft, the mortgagor, who mortgaged to John Irwin. This grant contains only the usual exceptions as to waters, access thereto, etc., etc.; and there is no reservation as to any right of the Crown to the mortgage mentioned, or to any right, present or future, to the land or in any way as to the alleged right, either of John Irwin or of the Crown, to John Irwin's estate.

I am of opinion that this grant cut out the mortgage as between James Raycraft and the Crown. The petitioner, Thomas Raycraft, is a purchaser for value from James Raycraft.

For the above reasons, I think that Thomas Raycraft is entitled to the certificate as asked for by him, and that these appeals should be dismissed with costs.

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Mar. 15.

Landlord and Tenant—Lease of Hotel—Rent—Proviso for Rebate—Distress for Rent Reserved without Making Rebate—Tenant's Remedy—Replevin—Action on Covenant—Excessive Distress—Relief as to Rebate—Money Paid into Court—Counterclaim for Rent—Damages for Holding over—Reference—Costs.

A lease of hotel premises contained a proviso that, in a certain event (which happened), the lessors should make a reasonable rebate in the rent which the lessee covenanted to pay. Notwithstanding that an action was pending for a declaration as to the rebate which should properly be allowed, the defendants (the lessors) distrained the goods of the plaintiff (the lessee) in the hotel, and the plaintiff brought this action, for replevin and other relief, paying into Court the amount of the rent in question:—

Held, that the defendants' covenant to make the rebate did not directly affect the reservation of rent; the rebate was to be made by the defendants from time to time, and for their refusal to make it the lessee's remedy was by action for breach of covenant; and, therefore, so far as the action was founded on replevin, it failed, the rent not having been tendered before the distress.

Bickle v. Beatty (1859), 17 U.C.R. 465, specially referred to.

But *held*, that the plaintiff was entitled to damages for excessive distress, the value of the goods distrained being wholly out of proportion to the rent distrained for.

Quære, whether any cause of action had arisen for breach of covenant for not making a reasonable rebate in respect of the rent distrained for, the rent not having been paid or tendered before the distress; but this it was not necessary to determine, as any relief to which the plaintiff might be entitled in respect of the rebate could be administered under Con. Rules 1069 and 1072 in dealing with the money which had been paid into Court.

Held, that on their counterclaim the defendants were entitled to recover the rent accrued due under the lease, subject to the rebate as ascertained in the former action; but their claim for double the yearly value for holding over certain rooms outside the hotel was disallowed, the agreement being that the plaintiff was to hold them during the term of the lease of the hotel.

A reference was directed; and the plaintiff was allowed the costs of the action except as to his claim in replevin; the defendants were allowed no costs of the action or counterclaim, their conduct having been harsh and unreasonable.

ACTION for replevin, wrongful distress, and excessive distress. Counterclaim for rent, etc. The facts are stated in the judgment.

December 7, 1909. The action was tried at Barrie before OSLER, J.A., without a jury.

J. M. Ferguson and *J. T. Mulcahy*, for the plaintiffs.

A. E. H. Creswicke, K.C., for the defendant Quinn.

F. G. Evans, for the defendant Reeve.

March 15. OSLER, J.A.:—The plaintiff was tenant of the defendants of the hotel and premises in the town of Orillia known as "The Orillia House" for a term of ten years from the 1st May, 1899, renewable for a further term of ten years, at the yearly rent of \$1,200, payable in equal sums of \$100 on the 1st day of each month, commencing on the 1st day of June, 1899. The lease contains the usual covenant by the lessee to pay the rent, and a proviso for re-entry by the lessors on non-payment, and at the end a proviso as follows: "Provided that in the event of any law being enacted in the future which shall prohibit the sale of intoxicating liquors upon the demised premises, the said lessors shall make a reasonable rebate in said rent during the period of such prohibition."

On the 8th February, 1908, a "local option" by-law was passed by the town of Orillia to prevent the sale of intoxicating liquors. The by-law was quashed for some irregularity, but, the Provincial Secretary having refused his consent, under the authority of 8 Edw. VII. ch. 54, sec. 11, to the issue of licenses to sell liquor in the town, the by-law having been carried by the requisite majority of the persons entitled to vote thereon, the sale of intoxicating liquors became and was in

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fact by law prohibited therein, as held by Riddell, J., in a former action between the parties: *Hessey v. Quinn* (1909), 18 O.L.R. 487.

Shortly after the execution of the lease, the plaintiff rented from the defendants, for use in connection with the hotel, three bed-rooms over an adjoining store, for \$48 per year, payable at the rate of \$4 per month, at the same time as the rent of the hotel; and later on also rented for a similar purpose three sample rooms over another adjoining store at \$80 per annum, payable monthly, at \$6.66 per month, in the same way, and the necessary communications were made between these sets of rooms and the hotel.

In May, 1908, the plaintiff objected to paying the rent for the hotel until the amount of the rebate had been ascertained by agreement or by arbitration, but the defendant refused to take less than the whole, apparently desiring that the plaintiff should surrender the lease. The defendant continued to demand, and the plaintiff to refuse, payment; and in the beginning of November, 1908, the rent as reserved by the lease was distrained for. The plaintiff paid the amount under protest on the 11th November, having in the meantime on the 6th November brought an action for a declaration as to the rebate which should properly be allowed under the terms of the proviso. This action was tried before Riddell, J., who on the 13th April, 1909, gave judgment in the plaintiff's favour, declaring him entitled to a rebate, and referring it to the Master at Barrie to ascertain the amount: 18 O.L.R. 487. The formal judgment, issued the 1st May, 1909, is "that the plaintiff is entitled to a reasonable rebate in the rent payable under the lease, and that such reasonable rebate shall be calculated from the 1st May, 1908, during such portion of the plaintiff's tenancy as the prohibition may be in force."

Notwithstanding the pendency of the action, the defendant, on the 18th March, 1909, again distrained on the plaintiff for the whole of the rent as reserved by the lease, payable in November, December, January, and February, 1909, and also for the rent said to be due in respect of the six rooms rented by the verbal agreements already mentioned, in all \$482.64. On the 22nd March the plaintiff brought the present action of replevin, paying into Court, presumably under Con. Rule 1069, the amount of the rent in question. He sues also for an excessive

distress, the goods distrained being more than were necessary to satisfy all rent that could, under any circumstances, be due and in arrear.

It was stated at the trial that the Master's report in the first action had been made on the 8th October, 1909, finding that the sum of \$300 was a reasonable rebate. An appeal from the report was said to be pending, but, if so, it does not seem to have been yet set down.

The principal contention before me was that, while the amount of the rebate was unascertained, the right of distress was suspended or non-existent, the amount payable for rent being, under the circumstances, no longer a fixed and ascertained sum.

As regards the rent in respect of the six rooms, it was contended that there was no right to distrain for it on the plaintiff's goods in the hotel, the only place where the distress was in fact made.

I have not now to consider the question of the plaintiff's right to have a reasonable rebate. That has been settled so far as I am concerned by the judgment of Riddell, J.; but it was not necessary for the learned Judge to decide, and he did not decide, the question whether the defendants could distrain without first having made it, or at all.

The questions are: (1) whether the right of distress was gone, the rent reserved having become uncertain because the rebate had not been ascertained; (2) whether the lessor could distrain without having first made the rebate; or (3) whether the tenant's only remedy, apart from the question of the distress being excessive, is by action for breach of covenant.

It rested with the lessors, in the first instance at all events, to determine what rebate should be allowed. It was not, necessarily, to be the result of agreement between the parties or of arbitration, but, if the lessors did not or would not make it, or if the amount was not reasonable, the Court would, as has been held, enforce the performance of the lessors' covenant by action and so ascertain what the rebate should be.

In *Davies v. Stacey* (1840), 12 A. & E. 506, an action of replevin, the case was of a lease of a dwelling-house at a rent of £40 per annum. Underneath the signatures of the parties were written the words "The allowance of the road to the Six Bells' Yard to

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be made as usual." It appeared that before the lease was made the tenant of the dwelling-house had used to pay a yearly sum to the occupiers of the Six Bells' inn for a passage through the inn-yard to the dwelling-house, and that, on the production of the receipt for this sum, the lessors had allowed it to the tenant in the settlement of the rent. The fact of payment by the tenant on this occasion had not been proved, but it was held, *obiter*, that, assuming that the words referred to amounted to a covenant, it was a mere covenant, and no alteration of the rent.

Mason v. Chambers (1604), Cro. Jac. 34, was an action of trover for tithes, and a question arose upon a lease by the Prior of Westbridge for forty years at four pounds per annum. The lessee covenanted to bring the rent to the Prior's house, the latter covenanting to abate him (*dare et reddere*) twenty pence at every day of payment in respect of the "portage." "It was moved, whether this covenant to abate and deduct twenty pence upon every day of payment, being by the same indenture (was) such a defalcation of the rent as that it may be said to be *in tenurâ* J.S. under the rent of £3 16s. 8d.—and all the Court resolved that it was not; for the rent reserved is four pounds, and the other part is but a mere covenant, and no alteration of the rent."

Dallman v. King (1837), 4 Bing. N.C. 105, was an action for an excessive distress. It had been agreed that the tenant should expend £200 in repairs, and should be allowed to retain that sum out of the first year's rent of the premises. The landlord distrained property to satisfy the whole rent without making the allowance, and he was held to be liable for having made an excessive distress. The right to distrain was admitted by the form of the action.

Graham v. Tate (1813), 1 M. & S. 609, was an action of assumpsit for money paid, etc. The plaintiff was tenant to the defendant under a lease in which he covenanted to pay all taxes, except the landlord's property tax, which the defendant agreed to allow, and to expend £20 in repairs, which the defendant also agreed to allow, but distrained for the whole rent without allowing for either. The plaintiff was held entitled to recover for the money paid for the landlord's property tax, but not for the repairs, which should have been sued for in an action on the agreement.

See also *Smith v. Fyler* (1842), 2 Hill (N.Y.) 648.

In none of these cases does there appear to have been any reason for holding that the rent as reserved by the lease had become uncertain. In one the lease was to "give and return" to the tenant a fixed allowance for his trouble in bringing the rent, and in others to allow on the rent the payments which the tenants might have made for the use of way or for repairs. The allowances were, as it has been said, collateral to the rent. In effect the landlord was to give credit for the stipulated allowances as payments on account. If he failed to do so, the remedy of the tenant was, not by replevin, but by an action for breach of covenant, or for excessive distress for such damage as is recoverable in that form of action.

Bickle v. Beatty (1859), 17 U.C.R. 465, though not satisfactorily reported, is nearer to the present case, in respect of the allowance not having been determined by the lease, than any which I have seen. The defendant had leased a farm to the plaintiff for seven years, at a rent of fifteen shillings per acre. The lease contained the clause: "And it is further agreed that the said (defendant) shall at any and all times have the power to sell and dispose of any part or parts of the said farm, making a reasonable and fair deduction from the rent in consequence thereof, and if any disagreement should arise as to the sum to be deducted, then it may be left to arbitration." The defendant conveyed an acre of the demised premises to the Grand Trunk Railway Company after proceedings for expropriation had been commenced. The parties disagreed as to the principle on which the deduction should be made, and the defendant distrained, assuming, as I infer, to fix the amount of it himself. The plaintiff then brought his action. The fourth count of the declaration was for making an excessive distress; the fifth, for distraining when no rent was due; the sixth, for distraining for more rent than was due; and the ninth, for breach of the covenant to make an allowance and refusing to refer to arbitration. The other counts need not be noticed. At the trial it was agreed that a verdict should be entered for the plaintiff with nominal damages on the fourth count, and on the fifth for £5 5s. 9d., if the Court should be of opinion that the defendant's right to distrain had ceased under the lease; and, if it had not, then the verdict to be entered for the defendant; that a verdict should be entered for the plaintiff on the ninth count

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for nominal damages, subject to the opinion of the Court as to the principle on which they should be ascertained. If the Court should declare that the deduction should be made per acre, and that the plaintiff had no other right to claim deduction, then a verdict should be entered for the defendant on the second, third, fourth, and eighth counts.

On the subsequent motion there seems to have been a difference of opinion, at all events in regard to the result as expressed. The Chief Justice said (p. 469): "The right to make a distress did not, I think, necessarily cease merely because the rent had become uncertain on account of the land conveyed to the company. It would have ceased if there had been a wrongful eviction of part of the land by the landlord, but that was not the case here." Then he quotes the agreement, and adds: "This being the express agreement, the landlord had no right to apportion the rent for himself, and to distrain for such amount as he thought reasonable under the circumstances; but he was bound first to propose a reduction and see whether it would be assented to, and if not, then to go to arbitration, or at least to offer to do so. Instead of that he assumed the right to settle the deduction himself in the first instance, subject to the control of a jury, if he should afterwards appear to have distrained for too much. I think that, whatever he might have done if the lease had been silent as to the method of apportionment, he could not so take the matter into his own hands in the face of this provision in the lease."

On the ninth count it was held that the verdict should be entered for the plaintiff for £15, and I should have thought that the opinion expressed by the learned Chief Justice would have led him to hold that the plaintiff was entitled to retain his verdict on the fifth count; but he concludes: "My opinion is, that a verdict should be entered for the defendant on the fifth and sixth counts." Burns, J., held that the verdict should be entered for the plaintiff on the fifth count, saying (p. 471): "Before the defendant sold, the rent was fixed and ascertained by the lease, but when he exercised the privilege there was no fixed or ascertained amount of rent. . . . The landlord had no right himself to apportion the rent to be paid. . . . He could not say the amount of rent should be reduced by so much as the quan-

tity sold would amount to at fifteen shillings per acre. The agreement is, that a fair and reasonable reduction shall be made. What that shall be has never been settled. . . . The defendant in that state of matters was reduced to bring his action for use and occupation, and his right to distrain was gone until at least an attempt to arbitrate had been made. The amount of rent to be paid had become uncertain." McLean, J., concurred, it is not said with whom, and we do not know in what terms the judgment was finally drawn up.

The case seems to have turned on the special terms of the agreement. Both parties were to agree upon the deduction; in effect, to agree upon what the rent should be for the future; and, if they could not, it was to be left to arbitration. Whatever the amount arrived at, it would necessarily fix the rent which would be payable during the remainder of the term. Stress is laid upon the fact that the landlord had no right to determine it for himself, and I infer that, if the language of the agreement had been similar to that in the present case, the right of distress would not have been held to be affected.

Here the rebate was to be made by the lessors, and from time to time while the prohibitory law was in force. Their covenant did not directly affect the reservation. In *Hydraulic Press Brick Co. v. McTaggart* (1898), 76 Mo. App. 347, 354, it is said: "A debtor is not entitled to a promised rebate until he has paid or tendered the price of the thing sold. This is the true import of the term 'rebate' arising both from the sense given to it in the ordinary use, and in the definitions of the lexicographers:" 33 Cyc. 1570.

If the lessors had expressly agreed to allow, say, \$300 per annum during that time, it would not have affected their right to distrain according to the cases I have referred to, that not being a "defalcation" of the rent, and I cannot see how it makes any difference in that respect that the rebate had not been ascertained by the lease. It might be ascertained on payment of the rent, which was not, though the rebate may have been, uncertain. For the lessors' refusal to make it, the tenant's remedy was, in my opinion, by action for breach of covenant, and therefore, so far as the action is founded on replevin, it fails, the rent not having been tendered before the distress.

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In respect, however, of the claim for making an excessive distress, I think a cause of action has been well proved. The value of the goods distrained, making every allowance which is usually made in such cases, was, as I find, wholly out of proportion to the rent distrained for, part of which indeed, that is to say, the arrears of rent for the six rooms, was not distrainable for at all on the goods in the hotel. The goods were not in fact removed or sold, but the tenant was put to considerable inconvenience, and I assess the damage on this head at \$100.

I am not satisfied that any cause of action had arisen for breach of covenant for not making a reasonable rebate in respect of the rent distrained for, the rent not having been paid or tendered before the distress, nor is it clear from the statement of claim that such a cause of action is stated or relied upon. This, however, seems immaterial, as any relief to which the tenant may be entitled in respect of the rebate can be administered under Con. Rules 1069 and 1072 in dealing with the money which has been paid into Court as security for the rent distrained for. This also makes it unnecessary to direct judgment for the return of the goods replevied, as all claims of the parties can be adjusted in the present action.

On their counterclaim the defendants are entitled to recover the rent accrued due under the lease from the 1st March, 1909, to the 1st October, 1909, subject to the rebate as ascertained or to be ascertained under the judgment of Riddell, J. They are also entitled to recover the rent due in respect of the six rooms during the same period.

The claim for double the yearly value for holding over these rooms, I disallow. I find that, by the agreements under which they were rented, the plaintiff was to hold them during the term of his lease of the hotel.

The proper judgment, therefore, would seem to be to refer it to the Master at Barrie to ascertain: (a) the amount of rent due to the defendants, the lessors, at the date of the distress and up to and inclusive of the 1st October, 1909, in respect of the hotel premises, at the rate mentioned in the lease, and for the additional sum of \$10 per month agreed to be paid in consideration of putting in heating plant and apparatus; (b) the rent due at and for the same periods for the six rooms in con-

nection with the hotel; (c) the rebate of the rent of the hotel as reserved by the lease, as the same may be or has been ascertained fixed and allowed, under the judgment of Riddell, J.; (d) the amount of the rebate and the sum I have allowed as damages for excessive distress to be set off against the sum which may be found due for rent under the above heads, and the defendants, the lessors, to have judgment for the excess.

As to costs: the plaintiff will have the costs of the action, except in so far as such costs relate to his claim in replevin.

The conduct of the defendants was harsh and unreasonable in distraining while the former action was pending, and a few days only before it was to be tried. They had no reason to doubt the plaintiff's readiness and ability to pay what was due so soon as it should be ascertained, and they should have no costs of the action or counterclaim.

Further directions and subsequent costs reserved.

[IN CHAMBERS.]

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Writ of Summons—Service out of the Jurisdiction—Order Allowing Service—Insufficient Material—Supplementing on Motion to Set aside—Con. Rule 162 (e), (h)—Place of Contract—Place where Payment to be Made—Conditional Appearance—Assets in Ontario—Garnishable Debt.

Jan. 28.
March 16.

Where the material upon which an order is made for leave to serve a writ of summons out of the jurisdiction is insufficient, and the defendant moves to set aside the order and the service made pursuant to it, and upon that motion the plaintiff files in answer material sufficient to support the order, it and the proceedings under it should be validated.

Great Australian Gold Mining Co. v. Martin (1877), 5 Ch.D. 1, followed.

The action was for the price of goods sold and delivered; the plaintiff had shipped the goods from a place in Ontario to the defendant in Quebec; and upon an application to set aside an order for service upon the defendant in Quebec and the service effected there, it was in doubt upon the affidavits whether the contract was made in Ontario or Quebec, and, if made in Quebec, whether payment was to be made in Ontario (Con. Rule 162(e)):
Held, that the proper order was one allowing the defendant to enter a conditional appearance.

Canadian Radiator Co. v. Cuthbertson (1905), 9 O.L.R. 126, followed.

Held, also, that the defendant at the time the order was made had assets in Ontario of the value of \$200, within the meaning of Con. Rule 162 (h).
A garnishable debt owing by a person in Ontario is "assets" in Ontario.
A debt by contract can have no other local existence than the personal residence of the debtor.

Commissioner of Stamps v. Hope, [1891] A.C. 476, followed.

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MOTION by the defendant to set aside an order under Con. Rule 162, made by a Registrar, sitting for the Master in Chambers, dated the 9th August, 1909, allowing the plaintiff to issue a writ of summons for service on the defendant out of the jurisdiction, and to set aside the writ issued pursuant thereto and the service of it upon the defendant at Montreal, in the Province of Quebec. The facts are stated in the judgments.

January 26. The motion was heard by the Master in Chambers.

E. P. Brown, for the defendant.

W. R. Smyth, K.C., for the plaintiff.

January 28. THE MASTER:—The order was clearly made on insufficient material, and was liable to be set aside for three reasons:—

(1) The affidavit on which it was granted was made by the plaintiff's solicitor; it merely states that the action is for goods sold and delivered by the plaintiff's assignor to the defendant; it does not state where the sale was effected or where payment was to be made.

It was suggested on the argument that the writ and statement of claim might be looked at, on the ground that they were before the Registrar when he made the order. They were not mentioned in the affidavit, and could not strictly be considered now. But, when looked at, they do not advance the matter. They are both as bald as the affidavit itself, of which indeed the statement of claim is only an echo.

This was clearly insufficient to give authority for the order: see *Perkins v. Mississippi and Dominion Steamship Co.* (1884), 10 P.R. 198.

(2) A second reason is, that, under the subsequent decision of Meredith, C.J., in *Armstrong v. Proctor* (1909), 14 O.W.R. 765, 767, the order was wrong in requiring the defendant to deliver his statement of defence within the time limited for appearance.

(3) A third reason is, that the time for appearance and delivery of statement of defence was made fifteen days, whereas the least that could be given is eighteen days: see *Lovell v. Taylor* (1905), 5 O.W.R. 525. This, however, could be corrected if it was the only defect, being evidently a mistake for eighteen.

In answer to the motion an affidavit has been filed, made by the president of the company with whom the dealings in question were had by the defendant, and by whom the assignment sued on was made to the plaintiff. This affidavit gives what would have been sufficient grounds for making an order in the first place. The deponent has been cross-examined on it, but the matter is still left in doubt on the two points set out by the deponent: (1) whether the contract was made in Ontario or Quebec, and, if made in Quebec, whether payment was to be made in Ontario; and (2) whether the defendant has assets in Ontario sufficient to satisfy Con. Rule 162, clause (h), though that seems not unlikely.*

It follows from *Canadian Radiator Co. v. Cuthbertson* (1905), 9 O.L.R. 126, that the proper course is to dismiss the motion, and allow the defendant to enter a conditional appearance within ten days.

As the order was clearly made on insufficient material, the defendant was justified in his motion, and the costs should, therefore, be to him in any event. It is only on the strength of the material filed in answer by the plaintiff that the order and proceedings thereunder can now be validated. But this should be done, following *Great Australian Gold Mining Co. v. Martin* (1877), 5 Ch. D. 1.

The defendant appealed from the Master's order.

February 8. The appeal was heard by MEREDITH, C.J.C.P., in Chambers.

E. P. Brown, for the appellant.

W. R. Smyth, K.C., for the respondent.

* Con. Rule 162: (1) Service out of Ontario of a writ or notice of a writ may be allowed by the Court or a Judge wherever:—

(e) The action is founded on a breach within Ontario of a contract, wherever made, which is to be performed within Ontario or on a tort committed therein;

(h) Service may also be allowed where the action is for any other matter and it appears to the satisfaction of the Court or a Judge that the plaintiff has a good cause of action against the defendant upon a contract or judgment, and that the defendant has assets in Ontario of the value of \$200 at least, which may be rendered liable for the satisfaction of the judgment, in case the plaintiff should recover judgment in the action; . . .

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March 16. MEREDITH, C.J.:—This is an appeal by the defendant from an order of the Master in Chambers, dated the 28th January, 1910, dismissing the defendant's motion to set aside the order of a Registrar, sitting for the Master in Chambers, dated the 9th August, 1909, and the writ of summons and the service of it upon the defendant in Montreal, but giving him leave to enter a conditional appearance.

The material upon which the order of the 9th August, 1909, which gave leave to serve the writ out of Ontario, was made, was, no doubt, insufficient, but, upon the material before the Master on the motion, he, acting upon the authority of *Great Australian Gold Mining Co. v. Martin*, 5 Ch. D. 1, properly dealt with the motion upon that material, which would have been sufficient in the first instance to have warranted the making of the order.

The right to have service out of Ontario allowed is rested by the respondent upon the provisions of Con. Rule 162, clauses (e) and (h).

The Master, following *Canadian Radiator Co. v. Cuthbertson*, 9 O.L.R. 126, being of opinion that, upon the material before him, it was in doubt, (1) "whether the contract was made in Ontario or Quebec, and, if made in Quebec, whether payment was to be made in Ontario; and (2) whether the defendant has assets in Ontario sufficient to satisfy Con. Rule 162, clause (h), though that seems not unlikely"—made the order which is complained of.

If, as Mr. McCoomb deposed, there was no binding contract prior to the shipment of the goods at Morrisburg, the case comes, according to *Blackley v. Elite Costume Co.* (1905), 9 O.L.R. 382, within clause (e) of Con. Rule 162, for the contract would then be governed by the law of Ontario, and in that case the place of payment would be in Ontario, where the creditor resides.

Mr. McCoomb's statement is disputed by the appellant, and in such cases, as decided by the Chancellor in *Canadian Radiator Co. v. Cuthbertson*, the proper practice is "not to try the disputed question of jurisdiction on affidavits, but to permit the defendant to enter a conditional appearance, and thereafter raise his contention on the record."

It is also, I think, shewn that the appellant at the time the order was made had assets in Ontario, within the meaning of

clause (h) of Con. Rule 162. That one person or firm, at all events, owed him a garnishable debt of more than \$200 is not open to question.

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It was contended by the learned counsel for the appellant that this debt was not assets in Ontario within the meaning of the Rule, but I am unable to agree with that contention. That a garnishable debt is assets within the meaning of a similar Rule was the opinion of the Court of King's Bench in Manitoba, in *Brand v. Green* (1900), 13 Man. L.R. 101; of Mathers, J., in *Gullivan v. Cantelon* (1907), 16 Man. L.R. 644; and of Macdonald, J., in *Bank of Nova Scotia v. Booth* (1909), 10 W.L.R. 313.

The decisions of the Manitoba Courts are in accordance with the statement of the law by Mr. Dicey in his *Conflict of Laws*, 2nd ed., p. 310. Dealing with the question of the situation of property, he enunciates the general maxim "that whilst lands, and generally, though not invariably, goods, must be held situate at the place where they at a given moment actually lie, debts, choses in action, and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides; or, in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced," and this statement of the law is supported by high English authority.

In *Commissioner of Stamps v. Hope*, [1891] A.C. 476, Lord Field, delivering the judgment of the Judicial Committee of the Privy Council, said: "Now a debt *per se*, although a chattel and part of the personal estate which the probate confers authority to administer, has, of course, no absolute local existence; but it has been long established in the Courts of this country, and is a well-settled rule governing all questions as to which Court can confer the required authority, that a debt does possess an attribute of locality, arising from and according to its nature, and the distinction drawn and well settled has been and is whether it is a debt by contract or a debt by specialty. In the former case, the debt, being merely a chose in action—money to be recovered from the debtor and nothing more—could have no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be, and it was held therefore to be *bona notabilia* within the area of the local jurisdiction within which he resided," etc.: pp. 481-482.

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And in *Winans v. The King*, [1908] 1 K.B. 1022, Buckley, L.J., said: "It has long ago been laid down that, while a simple contract debt is situate where the debtor is, a specialty debt is where the instrument happens to be:" p. 1030.

If, as was contended by Mr. Brown, the statement of Mr. Dicey is to be limited in its application to the determination of the situation of the debt for the purposes of an administration, the reasons which led to its adoption in the case of administration, I think, apply to clause (h) of Con. Rule 162.

The purpose of the Rule manifestly is to enable a creditor who is not otherwise entitled to sue his debtor in an Ontario Court to do so for the purpose of obtaining satisfaction out of the debtor's property in Ontario which may be made available to satisfy a judgment recovered in an Ontario Court; and it must, therefore, I think, have been intended that whatever property in Ontario might be made available for that purpose should be assets within the meaning of the Rule.

I have not overlooked the case of *Love v. Bell Piano Co.* (1909), 10 W.L.R. 657, in which Stuart, J.,* declined to follow the decisions of the Manitoba Courts, and expressed the opinion that "the ascription of a conventional locality to a debt by means of a legal theory in order to create jurisdiction would amount . . . to nothing less than judicial legislation:" p. 663. The reasoning upon which the conclusion of the learned Judge is founded seems to me to afford ground for questioning the policy of the legislation rather than for determining the meaning of the language which the Legislature has used; and I venture to think that the construction which he gives to the Rule amounts virtually to a repeal of the legislation which he was dealing with, by "judicial legislation."

I cannot part with the case without saying that I am indebted to the learned counsel for the appellant for the full and impartial citation of the authorities with which I was furnished by him.

The appeal is dismissed, and the costs of it will be in the cause.

*In the Supreme Court of Alberta.

[DIVISIONAL COURT.]

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Jan. 24.
March 18.

Trusts and Trustees—Settled Estate—Appointment of New Trustee—Order of Judge—Discretion—Review—Appeal to Divisional Court—Jurisdiction—Judicature Act, sec. 74—Opposition by Settlor to Person Appointed—Residence out of Ontario—Special Circumstances—Appointment of same Person by Foreign Court.

Under sec. 74 of the Judicature Act, an appeal lies to a Divisional Court from the order of a Judge appointing a new trustee.

An order of a Judge of the High Court appointing a new trustee to act with other trustees under a settlement was set aside, where it appeared that the person so appointed was resident out of Ontario, in which Province certain property subject to the settlement was situated; that the settlor was opposed to his appointment; and that there was reason to believe, from the circumstances and associations of the person so appointed, that he would not be able to hold an even hand between the persons interested under the trust; although it also appeared that he had been appointed a trustee by a Nova Scotia Court to act under the same settlement in respect of property in that Province. The discretion exercised in making such an appointment should be guided by general rules and principles; and there were in this case no such special circumstances as should induce the Court to depart therefrom.

In re Tempest (1866), L.R. 1 Ch. 485, followed.

Order of FALCONBRIDGE, C.J.K.B., reversed.

PETITION for the appointment of a new trustee of settled estate in the place of one who had become insane. The property which was the subject of the settlement was in Ontario. Herbert W. Sangster, the person suggested by the petitioners, lived in Nova Scotia.

January 22. The petition was heard by FALCONBRIDGE, C.J.K.B., in the Weekly Court.

Eric N. Armour, for the petitioners and the Toronto General Trusts Corporation.

N. F. Davidson, K.C., for Kathleen Alice Jones, the settlor.

F. W. Harcourt, K.C., for infant beneficiaries.

January 24. FALCONBRIDGE, C.J.:—The circumstances of this case are so exceptional that I feel justified in granting the prayer of the petition and appointing H. W. Sangster.

The order will provide for an undertaking by the trustees as to the appointment of new trustees, like that in *In re Freeman's Settlement Trusts* (1887), 37 Ch. D. 148.

Kathleen Alice Jones appealed from the order of FALCONBRIDGE, C.J.

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February 21 and 22. The appeal was heard by a Divisional Court composed of CLUTE, LATCHFORD, and SUTHERLAND, JJ.

N. F. Davidson, K.C., for the appellant. There was a breach of trust by the trustees of the settlement in selling certain lands without getting consideration for the appellant's contingent interest, and Sangster was a moving spirit in this sale. The appellant is the settlor, and she objects to Sangster's appointment as trustee. He does not reside in Ontario, where the lands are situate. Besides, a family estrangement has separated the appellant from her husband, her sister, and her mother. Sangster is her sister's husband, with whom her mother and her sister reside. Sangster is also solicitor for the mother, who has a power of appointment, and is liable to be influenced. For these reasons, Sangster is not a legally fit or proper person to act as trustee. As to the principles on which the Court will act in the appointment of a trustee, see *In re Tempest* (1866), L.R. 1 Ch. 485, 487. Sangster's appointment would be contrary to all these rules. Separate trustees can be appointed to separate trust estates under the same will: Seton's Judgments and Orders, 6th ed., p. 1226. As a general rule, the Court will not appoint a relative of a *cestui que trust* as trustee: Lewin on Trusts, 10th ed., pp. 40, 41; Easton's New Trustees, pp. 65, 66. The Court will not in general appoint a person trustee who is resident out of the jurisdiction. And, though the Court may do so in exceptional circumstances, it should first consider the cardinal rules such as the wish of the settlor, relationship, etc. It would be infringing those cardinal rules to appoint Sangster. Then, the additional objection of his residing out of the jurisdiction exists. The general principles governing the eligibility of persons for the office of trustee are laid down in Underhill's Law of Trusts, 6th ed., pp. 328, 329.

Eric N. Armour, for the petitioners and the Toronto General Trusts Corporation. In the first place, no appeal lies in this case to a Divisional Court. The application here was made under the Trustee Relief Act, R.S.O. 1897, ch. 336. Section 21 of this Act allows the High Court to appoint a trustee. Once this is done, that ends the matter. The Act does not give any right to appeal. Section 74 of the Judicature Act does not apply to this Act, which was in force as part of the equity jurisprudence, but was not formerly part of the Ontario statute law. On the merits, I sub-

mit there was no breach of trust, because the appellant's mother did not transfer her life interest at all, and so the appellant's contingent interest was not disposed of. Sangster is not solicitor for the appellant's mother. Sangster is a fit and proper person to act as trustee, even though residing out of the jurisdiction: *In re Simpson*, [1897] 1 Ch. 256; *Re Austen's Settlement* (1878), 38 L.T.R. 601; *Re Cunard's Trusts* (1878), 48 L.J.N.S. Ch. 192; *In re Hill's Trusts*, [1874] W.N. 228; *In re Maberly's Settled Estate* (1887), 19 L.R. Ir. 341; *In re Liddiard* (1880), 14 Ch. D. 310. As to the appointment of relatives as trustees, see *Re Hattatt's Will* (1870), 21 L.T.R. 781; *Re Lightbody's Trusts* (1884), 52 L.T.R. 40; *In re Burgess's Trusts*, [1877] W.N. 87. Sangster was appointed by the Nova Scotia Court, and the appeal against his appointment was dismissed for want of prosecution, and this Court should not interfere: *Jones v. Tuck* (1884), 11 S.C.R. 197.

F. W. Harcourt, K.C., for the infants. There was no breach of trust. Sangster is a fit and proper person for trustee. There are exceptional circumstances in this case: all parties are out of the jurisdiction; they are all agreed on Sangster except the appellant; the original trustees resided out of the jurisdiction; it is a foreign trust, the only thing being that the property is in Ontario. Then the comity between courts must be considered.

Davidson, in reply. As to the right to appeal to a Divisional Court, sec. 74 of the Judicature Act does apply. See 2 Edw. VII. ch. 13, sec. 9 (O.) As to the appointment of near relatives, see *Wilding v. Bolder* (1855), 21 Beav. 222. As to the appointment by the Nova Scotia Court, there are sufficient reasons why Sangster should not be appointed, without considering at all that he resides out of the jurisdiction.

March 18. The judgment of the Court was delivered by CLUTE, J.:—Motion by way of appeal from the order of the Chief Justice of the King's Bench whereby he directed that one Herbert W. Sangster should be appointed a trustee in the place and stead of Arthur P. Nagle.

In reference to the preliminary objection, that no appeal lies in a case of this kind to a Divisional Court, it is sufficient to say that sec. 74 of the Judicature Act expressly provides for such an appeal.

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The facts are somewhat complicated, but it clearly appears from the papers and what was alleged by counsel on both sides that the property in respect of which the trustee is sought to be appointed is in the city of Toronto; that the former trustee was declared a lunatic on the 23rd April, 1909; that by an order of the Supreme Court of Nova Scotia, dated the 15th May, 1909, one of the petitioners—Herbert W. Sangster—who now seeks to be appointed trustee, was appointed trustee under the indenture of the 10th June, 1900, creating the trust, by the Supreme Court of Nova Scotia, in substitution for the former trustee Arthur P. Nagle; and the said Sangster and Walter Goldsbury Jones, one of the former trustees, were appointed the trustees under the said indenture.

Appeal was taken in the Nova Scotia Court in respect of this order and dismissed for want of prosecution. By an order of the Supreme Court of Nova Scotia, dated the 7th June, 1909, the accounts of Walter Goldsbury Jones and Arthur P. Nagle were passed and allowed, and the said Arthur P. Nagle was discharged from all further liability as trustee under the said indenture. By a subsequent order of the 6th July, 1909, of the Supreme Court of Nova Scotia, the security of Herbert W. Sangster was approved and allowed.

The petition sets forth that the said Sangster is a fit and proper person to be appointed as such trustee, and has consented to act, if so appointed, and counsel for the respondents stated he was willing to act without emolument.

One of the petitioners, Alfred E. Jones, is the husband of the appellant, Kathleen Alice Jones, and is one of the parties to the said indenture, and the other petitioners, Arthur Nagle Jones, Kathleen Margaret Jones, Nora Wiseman Jones, and Owen Bell Jones, are all the children of the said Alfred Ernest Jones. The first two are of age, and the last two are infants under the age of twenty-one years. The petitioner Walter Goldsbury Jones is one of the original trustees under the said indenture, and the petitioner Herbert W. Sangster is the trustee appointed by the Supreme Court of Nova Scotia in substitution for Arthur P. Nagle, under said order above mentioned.

The said indenture of the 10th June, 1900, is the settlement under which the trustee is now sought to be appointed. It is

made between the said Alfred Ernest Jones, of the city of Halifax, in the Province of Nova Scotia, one of the petitioners herein, of the first part, and Kathleen Alice Jones, of the same place, his wife, the appellant herein, of the second part, and Walter Goldsbury Jones, of Halifax, and Arthur P. Nagle, of Fredericton, New Brunswick, called therein the trustees. The document sets forth that unhappy differences have arisen between the parties of the first part and of the second part, and they have consequently agreed to live separately from each other for the future, and to enter into such arrangements as are thereafter expressed. It further sets forth that the parties of the first and second part have four children, namely, Alfred Nagle Jones, Kathleen Margaret Jones, Nora Wiseman Jones, and Owen Bell Jones, being the four named in the petition. It sets forth, amongst other things, that the party of the second part (the appellant, Mrs. Jones) is entitled to certain real and personal property under the will of her grandfather, John Bell, of the city of Toronto, in the Province of Ontario, subject to the life estate of her mother, Susan N. Nagle, and that she became absolutely entitled under the said will of her grandfather, upon attaining the age of 21 years, to certain lands and premises in the said city of Toronto and known as the Bloor street property. The indenture then provides that they shall live separate and apart from each other, and will not commence or prosecute any action against each other therefor; that the husband, the said Alfred Nagle Jones, shall have the custody of the children; that the husband will pay to the trustees the annual sum of \$500 in trust for the wife under certain further conditions.

The wife, Kathleen Alice Jones, the party of the second part, in consideration of natural love and affection and of the sum of one dollar, grants, assigns, and transfers and sets over unto the said trustees, their executors and assigns, and the survivor of them, all the property, real and personal, except the Bloor street property, situate in the city of Toronto, of every kind, nature, and description, and wheresoever situate, whether in possession, or expectancy, or remainder, under the said will of her grandfather, and particularly all the lands and premises of real estate (except the said Bloor street property) situate in the city of Toronto and mentioned in and devised by the said will of the said John

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Bell, in trust for her said children, as therein provided, for their support and maintenance, and to be paid to said children as they each attain the age of twenty-one years.

The indenture further provides that the said Kathleen Alice Jones agrees with her trustees and with her said husband that, upon and after the death of her mother, or as soon as she shall be entitled to the share under the will of her said grandfather, which is now subject to the life estate of her said mother, the trustees shall hold all the annual income thereof in excess of the sum of \$1,200 in trust for the said children.

The said wife further released all right to dower, with further assurances; and very full powers are given to the trustees to sell and manage the estate.

It is alleged on behalf of the appellant that a sale was put through which amounted to a breach of trust, and that another sale of lands was about to go through which would also, it was alleged, amount to a breach of trust. The charge of a breach of trust was by no means made clear, and I only refer to it as indicating the view of the appellant.

The principal points outstanding are, that the appellant is the settlor, who, owing to family estrangements, conveyed a large estate, amounting to somewhere between \$60,000 and \$120,000, to her children, reserving a modest, if not scanty, income for herself. The lands are in Ontario. The proposed trustee does not reside in this Province. The family estrangement has separated the appellant from her husband, her sister, her mother, and her nephews and neices. Mr. Sangster is her sister's husband, with whom her sister and her mother reside. Her mother has a power of appointment, which may be exercised in favour of any of her children, including the appellant.

It is further charged that the proposed trustee is solicitor to the mother, who has this power of appointment, and who may appoint in his wife's favour. He denies that he is solicitor for the mother, although he has acted for her in some trifling matters. But the fact is that she resides with him, and is liable to be subjected to his influence, if he sought to exercise it in favour of his wife with respect to the power of appointment and in regard to the management of the trust generally.

Under these facts and circumstances, would the appointment

of Mr. Sangster as trustee be in accord with the well-recognised principles upon which the Court should act?

In *In re Tempest*, L.R. 1 Ch. 485, 487, Sir G. J. Turner, L.J., says: "It was said in argument, and has been frequently said, that in making such appointments the Court acts upon and exercises its discretion; and this, no doubt, is generally true; but the discretion which the Court has and exercises in making such appointments is not, as I conceive, a mere arbitrary discretion, but a discretion in the exercise of which the Court is, and ought to be, guided by some general rules and principles. . . . First, the Court will have regard to the wishes of the persons by whom the trust has been created, if expressed in the instrument creating the trust, or clearly to be collected from it. I think this rule may be safely laid down, because if the author of the trust has in terms declared that a particular person, or a person filling a particular character, should not be a trustee of the instrument, there cannot, as I apprehend, be the least doubt that the Court would not appoint to the office a person whose appointment was so prohibited, and I do not think that upon a question of this description any distinction can be drawn between the expressed declarations and demonstrated intention. . . . Another rule which may, I think, safely be laid down is this—that the Court will not appoint a person to be trustee with a view to the interest of some of the persons interested under the trust, in opposition either to the wishes of the testator or to the interests of others of the *cestuis que trust*. I think so for this reason, that it is of the essence of the duty of every trustee to hold an even hand between the parties interested under the trust. Every trustee is in duty bound to look to the interests of all, and not of any particular member or class of members of his *cestuis que trust*. A third rule which, I think, may safely be laid down, is, that the Court in appointing a trustee will have regard to the question, whether his appointment will promote or impede the execution of the trust."

It would appear to me that the appointment of the proposed trustee would be contrary to the principle laid down in every one of these rules. The appellant, the settlor in this case, is very strongly opposed to his appointment, and not unreasonably so. He is in a position where he might exercise, and where, having

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regard to his relations to his wife, it would be to his interest to exercise, an influence against the appellant, and in favour of his wife. It is difficult to see how he can hold an even hand between the parties interested under the trust. He might desire and intend to do so; but he could scarcely free himself from the continuous influence by which he would be surrounded; and, upon the other hand, his influence might, consciously or unconsciously, be exercised with the mother in favour of his wife and against the appellant in respect of the power of appointment. The very fact that this antagonism does exist, and may continue to exist, would have a tendency to impede and delay the execution of the trust. It would probably engender litigation, which might reasonably be expected to be avoided if a trustee were appointed who met the approval alike of the appellant and petitioners. The fact that the petitioners, related and situated as they are, urgently ask for the appointment of Mr. Sangster is in itself a ground for pause, opposed, as it is, by the appellant; and, coupled, as it is, with the peculiar circumstances of this case, that fact renders it, in my opinion, wholly inexpedient and not in the interests of the due administration of the trust, that he should be appointed.

As pointed out in Lewin on Trusts, 11th ed., p. 823, the Court will not in general appoint persons trustees who are resident out of the jurisdiction: *In re Guibert* (1852), 16 Jur. 852; *In re Custis's Trust* (1871), Ir. R. 5 Eq. 429; but has done so in several cases where the special circumstances render that course advisable.

In *In re Liddiard*, 14 Ch. D. 310, it was proposed to sell the estate and invest the money where all of the *cestuis que trust* resided, and in that case the trustees were appointed where the money was to be invested and the *cestuis que trust* resided. See also *In re Freeman's Settlement Trusts*, 37 Ch. D. 148; Easton's New Trustees, p. 65.

As a general rule, the Court will not appoint a *cestui que trust* or the relation of a *cestui que trust*: *Ex p. Clutton* (1853), 17 Jur. 988; Seton's Judgments and Orders, 6th ed., p. 1226; *Wilding v. Bolder*, 21 Beav. 222, where the Master of the Rolls, Sir John Romilly, said: "I cannot depart from the rule I have adopted of not appointing a near relative a trustee, unless I find it absolutely impossible to get some one unconnected with the family to undertake that office. I have always observed, that the worst

breaches of trust are committed by relatives, who are unable to resist the importunities of their *cestuis que trust*, when they are nearly related to them."

See also other cases cited in Easton's New Trustees, p. 66, where it is further said: "The solicitor of the tenant for life of a settlement is open to objection as a trustee;" citing *In re Kemp's Settled Estates* (1883), 24 Ch. D. 485, and other cases.

Mr. Sangster being a solicitor, and there being constantly questions arising which would require the advice of a solicitor, it is hardly to be expected that he would refuse such advice, if asked by either of the petitioners. Numerous other cases bearing upon the questions here involved are collected in Easton's New Trustees, pp. 65, 66, and 67.

In this case there would seem to exist, not one, but many reasons why the proposed trustee should not be appointed, which, in each particular case, are held sufficient to prevent the Court making the appointment.

In reading the many cases bearing upon the question and to some of which I have referred, I find it impossible to say that, under the circumstances of this case, the proposed trustee should be appointed. There is only one point upon which, on the argument, I felt, and still feel, some hesitation, and that is that Mr. Sangster, having been appointed within the Province of Nova Scotia, and the appeal against the appointment having been dismissed for want of prosecution, and the Chief Justice of the King's Bench having made the order, this Court ought not to intervene. There was no case cited, nor have I found one, directly in point. There is, however, the analogous case of ancillary letters where foreign probate or administration has been granted.

In *Enohin v. Wylie* (1862), 10 H.L.C. 1, the question is discussed, in so far as it relates to personal estate. The Lord Chancellor (Lord Westbury) there points out that the administration of personal estate belongs to the Court of the country where the deceased was domiciled at his death; that all questions of testacy and intestacy belong to the Judge of the domicile; that it is the right and duty of that Judge to constitute the personal representative of the deceased; and that to the Court of domicile belongs the interpretation of and construction of the will of the testator.

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In *In re Medbury* (1906), 11 O.L.R. 429, where a testator domiciled in Michigan, U.S.A., leaving property there and in this Province, appointed certain persons executors, making them also trustees of four-sixths of his estate, and the proper Probate Court in Michigan granted probate to them, and they having afterwards resigned as executors, though not as trustees, and requested and obtained the appointment of a trust company as administrators *de bonis non* with the will annexed in their place, and afterwards applied to the Surrogate Court of Essex for ancillary probate, which was opposed by the beneficiaries of the estate in Ontario, it was held, affirming the decision of the Surrogate Judge, that the Court ought to follow the Michigan grant to the trust company, and could not look into any circumstances that led up to it.

In the present case the estate which formed the subject of the settlement came from the will of the late John Bell, a resident of Toronto. The estate is in Toronto, and under the will of John Bell is being administered by the Toronto General Trusts Corporation of Toronto, one of the present trustees residing in New Brunswick and the other in Nova Scotia. The appellant resides in Boston, and the petitioners reside in Nova Scotia. Inquiries regarding the trust estate, its value, and the most opportune time for sale, would have to be made where the estate is, and it would, I think, be most convenient in the interests of all parties and beneficial to the estate, aside from other considerations, that one of the trustees should be resident here.

With great deference, I do not think that there are such special circumstances as should induce the Court to depart from the well-recognised principles applicable in a case of this kind.

The order appointing Herbert W. Sangster must be set aside. Costs of all parties here and below out of the estate.

[DIVISIONAL COURT.]

CAMPBELL V. COMMUNITY GENERAL HOSPITAL ALMSHOUSE AND
SEMINARY OF LEARNING OF THE SISTERS OF CHARITY,
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Jan. 18.
Mar. 18.

Charitable Corporation—Contract not under Seal—Necessary Work—Benefit of Corporation—Partly Executed Contract—Powers of Corporation—Recovery for Work Done—Quantum Meruit.

Upon the question of the liability of a corporation for work done for the corporation upon a contract not under seal, the distinction once insisted on, as to the work being "essential" for the purposes of the corporation, is modified by the trend of recent decision, so that "beneficial" work is enough if it be incidental or ancillary to the purposes for which the corporation exists. Complete execution of the contract is not essential where there is actual part performance, and the completion of the work has been prevented by the act of the corporation.

Lawford v. Billericay Rural District Council, [1903] 1 K.B. 772, and *Bernardin v. Municipality of North Dufferin* (1891), 19 S.C.R. 581, followed.

The defendants, a benevolent community, incorporated by the Canadian statute 12 Vict. ch. 108, for the maintenance of an hospital, almshouse, and seminary of education for orphans, held, as authorised by the Act, a tract of land which they worked as a farm for stock and dairy purposes, using the produce almost entirely for the sustenance of the members of the community and their charges. The plaintiffs agreed (not in writing) with the defendants' manager to drill and make a well upon the farm at a price of \$2 per foot, an additional well being needed for farm purposes. The manager was empowered to make such a contract at an expense of \$200, as between her and the defendants. The plaintiffs dug to a depth of 154 feet, but found no water, and were then discharged by the manager:—

Held, that the contract was *intra vires* of the corporation, having regard to the provisions of their Act of incorporation, and, though not under the corporate seal, was binding on the corporation, upon the principles above stated.

Held, also, that the plaintiffs were entitled to recover for the value of the work done as far as it went, in effect upon a *quantum meruit*, which should be determined by the contract price.

Judgment of BRITTON, J., reversed.

ACTION to recover the value of work done by the plaintiffs in digging a well for the defendants. The facts are stated in the judgments.

January 11. The action was tried before BRITTON, J., and a jury at Ottawa.

A. E. Fripp, K.C., for the plaintiffs.

M. J. Gorman, K.C., and A. E. Lussier, for the defendants.

January 18. BRITTON, J.:—The defendants, for the purposes of their charity and work, own a farm in the township of Gloucester. The plaintiffs are drillers of wells for water. The Bursar of the defendants, or as she is called the Procurator-General, or General

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Manager, of the defendants, desiring, if it could be done at moderate expense, to have an additional well upon this farm, made an agreement, not in writing, with the plaintiffs.

The plaintiff Argue stated that the agreement was that the plaintiffs should bring on their plant and proceed to drill for water, and get water, and that the defendants were to board the plaintiffs' men during the work, furnish fuel for the plaintiffs' engine, and, upon water being found, pay \$2 per foot for the distance drilled.

The general manager, Sister Rosalie Demers, says that it was a term of the contract that the plaintiffs should find water in three or four days, or, if not, they would get no pay other than board of men and fuel for engine.

During the trial, and before all the evidence was in, I determined to submit only one question to the jury, and upon their answer and upon the evidence to determine the case. To the question, "Was it a term of the contract that the plaintiffs should get water in three or four days, or get no pay other than board of men and fuel for the engine?" the jury answered in the negative. The agreement then was, as stated by the plaintiff Argue, that the plaintiffs should drill for, and find, water, the defendants in the meantime boarding the men and supplying fuel.

After the plaintiffs had drilled for four days without finding water, Sister Demers did not insist upon the work being stopped. She said in substance that she did not wish to be too peremptory, and was put off by the men saying that probably water would soon be found. That, however, is not material, in view of what I must now deal with as the contract proved. On the eighth day Sister Demers ordered the men to stop work. A hole had then been drilled to the depth of 154 feet, for which the plaintiffs claim \$2 per foot, \$308 in all, in addition to \$6 for 8 ft. 4½ inches of pipe.

The defendants plead that the contract relied upon is not valid and binding upon the defendants, as beyond the scope of the authority of Sister Demers, and that the contract is otherwise invalid as not in writing and not in any way authenticated by the defendants' corporate seal. The defendants were incorporated by 12 Vict. ch. 108. The amending Act 24 Vict. ch. 116 gave to the defendants their present corporate name. They were incor-

porated and established as an hospital for the reception and care and education of indigent and infirm sick persons of both sexes, and of orphans of both sexes. They are in no sense a trading corporation. They are entitled "to purchase, acquire, hold, possess, and enjoy . . . lands," within this Province, "not exceeding in yearly value two thousand pounds currency."

I am of opinion that it was quite within the power of the defendants to incur the expense of an additional well upon the farm of their institution. Such a well would probably be useful, conducive to the saving of labour, to the health and convenience of the inmates and servants and staff of the institution; but the contract sought to be made was a very special one, and, unless I am prepared to say that in no case, where the consideration for payment is partly executed and where the contract itself is *intra vires*, can the objection of want of writing and want of corporate seal prevail, then I must give effect to the objection in this case.

The rule laid down in the case of *Lawford v. Billericay Rural District Council*, [1903] 1 K.B. 772, in appeal, is: "Where the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry those purposes into effect, and orders are given by the corporation in relation to work to be done or goods to be supplied to carry into effect those purposes, if the work done or goods supplied are accepted by the corporation and the whole consideration for payment is executed, there is a contract to pay implied from the acts of the corporation, and the absence of a contract under the seal of the corporation is no answer to an action brought in respect of the work done or the goods supplied."

The purposes of the defendant corporation in this case did not render it necessary that the work sued for should be done. The defendants have got along without such well as was contracted for. The contract was one which, if completely performed, might have involved the defendants in expense far beyond the reasonable value of any well obtained. The consideration for payment has not been fully executed, and the work of the plaintiffs has not been accepted in any other way than that the hole formed by drilling is upon their land. It is of no use to the defendants, and, so far as appears, cannot be made of any value to them.

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That is sufficient for my decision against the plaintiffs' right to recover, but I may add that, if the plaintiffs are entitled to recover at all, in this action, the measure of damages, in my opinion, is not necessarily the \$2 per foot for the depth of the drilling, but it is rather the damages for wrongful interference by the defendants with the work. That may be difficult to determine, as it is quite possible that the plaintiffs might not have found water at any such depth, if at all, that the plaintiffs could profitably reach.

The reasonable damages of the plaintiffs are, as I view the case, the loss of men's wages, the cost of transportation of, setting up and taking down and use of, plant, in all not to exceed \$175. It must be borne in mind—it seems self-evident—that the deeper the drilling the more expense, and the plaintiffs' claim is \$2 per foot from surface down without finding water.

Upon the question of seal, this case is clearly distinguishable from *National Malleable Castings Co. v. Smiths Falls Malleable Castings Co.* (1907), 14 O.L.R. 22. See *Leslie v. Township of Malahide* (1907), 15 O.L.R. 4.

I must dismiss the action, but it will be without costs.

The plaintiffs appealed from the judgment of BRITTON, J.

March 16. The appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ.

A. E. Fripp, K.C., for the plaintiffs. The only question left to the jury has been found in favour of the plaintiffs, but the trial Judge has found against them, on the ground that the contract, though *intra vires* of the defendant corporation, is not so necessarily incidental to the purposes for which they were incorporated as to bring the case within the exceptions to the general rule that a corporation can only contract under its common seal. It is submitted that the learned Judge erred in this view of the case, as the defendants' institution had the threefold aim of providing a hospital, an almshouse, and a seminary for the education of orphans, and it was necessary, in order to carry on this work properly, to maintain the farm in connection with which this contract was entered into. An adequate supply of pure drinking-water is a necessity for the inmates of such an institution. The contract made by the defendants was, therefore, within their

power to make, and it has been executed by the plaintiffs, who carried on their work till ordered by the defendants' manager to stop. The case comes within the principle laid down in *Lawford v. Billericay Rural District Council*, [1903] 1 K.B. 772, which is referred to in the judgment appealed from, and which, it is submitted, is not distinguishable from the present case. If the plaintiffs are entitled to succeed, they should receive the whole amount claimed, as the contract was executed, so far as this was permitted by the defendants.

W. E. Middleton, K.C., for the defendants. The defendants are not a trading corporation, and the maintenance of a farm in connection with their institution, while it may be highly beneficial to the inmates, is not essential to the purposes for which the defendants were incorporated, nor so necessarily incident thereto as to bring the contract in question within the scope of the exception contended for by the appellants: *London Dock Co. v. Sinnott* (1857), 8 E. & B. 347; *Lindley's Law of Companies*, 5th ed., p. 220 *et seq.* Even granting that the contract was *intra vires*, which is not admitted, it would require the seal of the corporation to give it validity. The *Lawford* case, relied on by the appellants, must be read in connection with *Clarke v. Cuckfield Union* (1852), 21 L.J.Q.B. 349, on which that decision was based, and reference to which will shew that it is distinguishable from the case now before the Court. The cases in which the contracts of corporations have been held valid, though not under seal, are those in which their subject-matter is trivial, or of constant occurrence, or incidental to the primary purpose of their incorporation, none of which conditions applies in the present instance. Reference was made to the following cases: *Leslie v. Township of Malahide*, 15 O.L.R. 4; *Bernardin v. Municipality of North Dufferin* (1891), 19 S.C.R. 581; *National Malleable Castings Co. v. Smiths Falls Malleable Castings Co.*, 14 O.L.R. 22, where most of the cases are collected; also the recent case of *Bourne v. Mayor, etc., of St. Marylebone* (1908), 24 Times L.R. 322, in which the distinction between trading and non-trading corporations is discussed by Ridley, J., whose views are neither adopted nor rejected by the Court of Appeal (see p. 613 of the same volume), where the case went off on another point. As to the measure of damages, in case the plaintiffs' main contention should prevail, it is sub-

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mitted that the learned trial Judge was right in restricting their claim as he has done, in view of the fact that they had only done the easier part of the work.

Fripp, in reply, referred to Leake on Contracts, 5th ed., p. 418, as to the effect of part performance in equity with relation to the general rule requiring execution by corporations under seal.

March 18. The judgment of the Court was delivered by BOYD, C.:—The evidence shews that the defendants are a benevolent community incorporated for the maintenance of an hospital, an almshouse, and a seminary of education for orphans, on a site in the city of Ottawa. In the vicinity of the city, about a mile and a half distant, they have also a large tract of land of 260 acres, used as a mixed farm for stock and dairy purposes—all the products of which are for the use of the sisterhood and their charges, except a small overplus of milk, which is disposed of by sale. This land is also held under their charter, to be found in the Canadian statute 12 Vict. ch. 108.

Two wells were on the farm, but a third one was needed. The farmer in charge so told the manager of the defendants, and she was empowered to make a contract for the digging of a third well, at an expense of \$200, as between her and the corporation. She contracted with the plaintiffs for the drilling and making of this well at a price of \$2 per foot. According to the defendants, this contract was based on the condition that water should be reached in three or four days, and that, unless water was then reached, there should be no liability. The plaintiffs say that there was no such limitation, but just a contract to do the work at the rate of \$2 per foot. The jury on this issue have found in favour of the plaintiffs, and this must be regarded as the only contract, and it is not in writing.

The plaintiffs were directed by the foreman in charge of the farm where to do the work, and the spot selected was at a place where there had been an opening already made, of much larger diameter, to the depth of 14 feet, in which water appears to have intermittently collected (p. 26). No doubt, the plan was to utilise this former work and sink the well deep enough to get a steady supply of water. At this point the plaintiffs worked for eight days, getting to a depth of 154 feet, but without reaching water.

They were then discharged by the manager of the defendants, on the ground, as they (plaintiffs) allege, that the work was going to cost too much, and that anyway no more work should be done that season. The plaintiffs' charge is \$308, which the defendants refuse to pay.

Defeated on the facts in dispute, the defendants raise legal objections, that the contract is *ultra vires*, and that it is not under seal. To these legal objections the learned trial Judge has given effect, and dismissed the action. With two important interlocutory observations of the Judge I fully agree: first, that this work appears to be one of necessary character; and second, that it is one in which the measure of recovery should be on a *quantum meruit*.

That the contract is *intra vires* does not seem to me to be doubtful. The farm was held by the corporation for the purposes of the well-being of the sisterhood and all the beneficiaries of the charity. It provided supplies of butter, milk, and vegetables, which had to be procured from some source, and better from this farm managed in their interest than from any other. The farm was largely and substantially ancillary to the proper maintenance of the institution; and it follows that for the proper management of the farm and the stock a plentiful supply of good pure water was indispensable, and in no other way could this be procured than by the digging or sinking of wells. That this well was needed is not disputed—is indeed admitted—the only qualification made by the lady-manager is that it was “not very badly needed” (pp. 11 and 30).

The modern doctrine as to corporate contracts not under seal, in the case of other than trading corporations, is thus given in “The Laws of England,” published under the imprimatur of the Earl of Halsbury: “In the case of corporations other than trading corporations, the rights and liabilities of the corporation upon contracts which are not under seal, and which do not fall within the exceptions already mentioned, depend upon whether the contracts relate to matters incidental to the purpose for which the corporation exists, and whether the consideration therefor has been executed by the party seeking to enforce them.” vol. 8, tit. “Corporations,” p. 383, No. 848 (1909).

Referring to the terms of the charter, it appears that the com-

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munity had established an hospital for the reception and care of indigent and infirm sick persons of both sexes, and of orphans of both sexes, and they were incorporated to carry on the good work, with power to hold and enjoy lands and tenements within the province: sec. 1 of 12 Vict. ch. 108. And by sec. 2 it was provided that the revenues, issues, and profits of all real and personal property should be applied to the maintenance of the members of the corporation, the construction and repair of buildings requisite for purposes of the corporation, and the payment of expenses to be incurred for objects legitimately connected with or depending on the purposes aforesaid.

These last words are, I take it, ample to cover a contract for the making of a well on the farm-land—that being an expense incurred for an object legitimately connected with the maintenance and the needs of the inmates of the institution. The learned Judge puts it very succinctly: “The corporation, being owner of a farm on which stock is kept, requires water for the purpose of carrying on the farm, and this work was a necessity for farm purposes; and that water is not found is not the point.” p. 21.

It seems to me that the distinction once insisted on, as to the work done being “essential” to the purposes of the corporation, is to be modified by the trend of recent decision, so that “beneficial” work is enough if it be incidental or ancillary to the purposes for which the corporation exists. Mathew, J., in his observations on this line of cases in *Scott v. Clifton School Board* (1884), 14 Q.B.D. 500, at p. 503, uses “necessity” as almost synonymous with “benefit”—a seal not being required when the contract is for a purpose incidental to the performance of the duties of the corporate body, and its necessity is shewn by proof that the corporation, with full knowledge of its terms and of all the facts had acted upon and taken the benefit of its performance.

Complete execution of the contract is not essential where there is actual part performance, and the completion of the work has been prevented by the act of the corporation. The well was sunk to the depth of 150 feet, to be utilised at a later season, and the plaintiffs were willing and offered to prosecute the work till water had been reached. Of the benefit of this work the corporation had been in possession, and there is no complaint of its improper execution, as far as it has gone.

In *Lawford v. Billericay Rural District Council*, [1903] 1 K.B. 772, the argument for the corporation was that the combination of the two facts, that the work has been done, and that it is incidental to the purposes of the corporation, is not enough to give a right of action. Besides, there must be at the making of the contract a question of convenience amounting to necessity, etc.: p. 778. In giving judgment Vaughan Williams, L.J., in commenting on *Nicholson v. Bradfield Union* (1866), L.R. 1 Q.B. 620, which was based on *Clarke v. Cuckfield Union*, 21 L.J.Q.B. 349, says the ground of the decision was that the coals were accepted and used, and that the law raised an implied contract to pay for them, though there was no contract under seal, and he did not understand that the case was decided upon the recognised exception as to necessity: p. 781. And he treats *Clarke v. Cuckfield Union* as decided upon the ground of the recognition of a contract arising on the receipt of the benefit of acts done at the request of the corporate body: p. 782.

And in *Bernardin v. Municipality of North Dufferin*, 19 S.C.R. 581, the majority of the Court approve of the sound and rational principle, equally applicable to the case of every corporation, that where work has been executed for a corporation under a parol contract, which work was within the purposes for which the corporation was created, and it has been accepted and adopted and enjoyed by the corporation after its completion, it would be fraudulent for the corporation to refuse to pay for it because of the absence of the corporate seal: p. 595.

I do not further labour this point as to the absence of the seal, which does not appear to me to affect the plaintiffs' right of action.

The learned Judge has expressed the opinion that, if the plaintiffs are entitled to recover, their damages should be assessed at \$175. But the action is not for breach of contract, but to recover the value of the work done, so far as it went—in effect a *quantum meruit*—and the usual rule in such case is to take the contract price as the measure to be applied. In that view, the plaintiffs should have judgment for \$308 and costs, and to that, I think, they are entitled.

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March 21. *Municipal Corporations—By-law Submitted to Electors—Voting on—Scrutiny of Ballot Papers by County Court Judge—Consolidated Municipal Act, 1903, sec. 371—Inquiry as to Right to Vote—Voters' Lists Act, 1907, sec. 24—Finality of List—Change of Residence after List Certified—Deducting Bad Votes—Duty of Judge—Prohibition.*

A County Court Judge holding, under secs. 369 and 371 of the Consolidated Municipal Act, 1903, a scrutiny of the ballot papers deposited at the voting upon a by-law submitted to the electors, has no authority to require any person who voted to state for whom he voted.

Upon such a scrutiny the Judge has, however, jurisdiction to enter upon an inquiry as to the right to vote of the persons who have voted; but that inquiry is limited, in view of the provisions for finality of sec. 24 of the Voters' Lists Act, 1907, as regards the right to vote of any person whose name is entered on the voters' list upon which the voting took place, to an inquiry as to whether, subsequently to the list being certified, he has become, by change of residence, disentitled to vote.

In re Local Option By-law of the Township of Saltfleet (1908), 16 O.L.R. 293, followed.

Semble, that, the jurisdiction of the County Court Judge being purely statutory, he has not the power to deduct the bad votes from the number cast in favour of the by-law, but his proper course is to certify the facts to the council.

Prohibition to the Judge of the County Court of Dufferin.

THIS was a motion by W. T. Bailey and F. Franks to prohibit the Judge of the County Court of the County of Dufferin, before whom was proceeding a scrutiny under sec. 371 of the Consolidated Municipal Act, 1903,* of the ballot papers which were cast when a vote was being taken on a proposed local option by-law of the municipality of Orangeville, from entering upon an inquiry as to the qualification of the persons who voted, to vote, or, in the alternative, for a mandamus directing him to inquire how the persons who might be found not to have been entitled to vote, voted, and to take evidence for the purpose of that inquiry.

* Section 369 of the Act provides: "If within two weeks after the clerk of the council which proposed the by-law has declared the result of the voting, any elector who was entitled to vote upon the by-law applies upon petition to the County Judge . . . and shews . . . reasonable grounds for entering into a scrutiny of the ballot papers . . . the Judge may appoint a day and place, within the municipality, for entering into the scrutiny."

"371. On the day and at the hour appointed, the clerk shall attend before the Judge with the ballot papers in his custody, and the Judge upon inspecting the ballot papers, and hearing such evidence as he may deem necessary, and on hearing the parties, or such of them as may attend, or their counsel, shall, in a summary manner, determine whether the majority of the votes given is for or against the by-law, and he shall forthwith certify the result to the council."

March 16. The motion was heard by MEREDITH, C.J.C.P., in the Weekly Court.

H. E. Irwin, K.C., and *C. R. McKeown*, K.C., for the applicants.

J. Haverson, K.C., for the petitioner for the scrutiny.

A. A. Hughson, for the Corporation of Orangeville.

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March 21. MEREDITH, C.J.:—It is clear, I think, that the Judge had no authority to require any person who voted to state for whom he voted.

Section 200 of the Consolidated Municipal Act, 1903, which by sec. 351 is made applicable to voting on by-laws, forbids that being done, and the other provisions as to secrecy of proceedings, secs. 198 and 199, shew how careful the Legislature has been to keep the secrecy of the ballot inviolate. I refer on this point to what was said in the *Haldimand Case* (1888), 1 Ont. Elec. Cas. 529, by Strong, J., at pp. 547-8, and by Taschereau, J., at p. 559.

But for the case of *In re Local Option By-law of the Township of Saltfleet* (1908), 16 O.L.R. 293, I should have thought that it was clear that upon a proceeding under sec. 371 the Judge has no jurisdiction to enter upon an inquiry as to the right of any one who has deposited his ballot paper to vote.

The inquiry is, in my opinion, limited to a scrutiny of the ballot papers, and differs only from a recount in that the Judge is not limited to dealing with the ballot papers *ex facie*, but may take evidence in the same way as may be done upon a trial of the validity of the election of a member of a municipal council (sec. 372), for the purpose of determining whether any ballot paper ought or ought not to be counted, this power being in terms limited to taking evidence as to all matters arising upon the scrutiny.

Sections 139 to 143 are the sections which relate to ballot papers at a municipal election; the thing called a ballot paper is the paper on which a voter indicates the person for whom he votes, and the form of it is prescribed by sec. 141.

Section 145 provides for the polling places being furnished with a compartment "in which the voters can mark their votes screened from observation." The voter, no doubt, votes by marking and depositing in the ballot box, in the prescribed manner, his ballot paper; and every ballot paper properly marked and deposited is, in that sense, the vote of the person by whom it is deposited. It is in that sense, I think, that the Judge is, under

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sec. 371, to determine whether the majority of the votes given is for or against the by-law. In other words, whether, according to the way in which the genuine and properly marked ballot papers are marked, the majority of the votes given is for or against the by-law.

These sections are, by sec. 351, made applicable to voting on a by-law which requires the assent of the electors, and sec. 340 prescribes the form of the ballot paper to be used when the vote is being taken.

I do not stand alone in my view. My brother Teetzel decided the *Saltfleet* case in accordance with it. Anglin, J., in *In re McGrath and Town of Durham* (1908), 17 O.L.R. 514, referring to the *Saltfleet* case, said: "The Court expressed the view that this section (sec. 24 of the Voters' Lists Act, 1907) applies to such proceedings (*i.e.*, the proceedings before the Judge under secs. 369 to 372 of the Consolidated Municipal Act, 1903), and that it was within the jurisdiction of the County Court Judge to disallow votes covered by any of the specified objections. But for this expression of opinion I should have been strongly inclined to hold that sec. 24 of the Voters' Lists Act does not apply to proceedings under secs. 369-372 of the Municipal Act. Although termed a 'scrutiny' in the heading and side-note to sec. 369, in the section itself these proceedings are called 'a scrutiny of the ballot papers.' I should have thought it no part of the duty of the Judge under these sections to inquire into the qualification or right to vote of any voter, and not within his jurisdiction to question the legality or sufficiency of any vote cast except upon grounds apparent *ex facie* of the ballot papers. It is a scrutiny of ballot papers, not of votes, which the County Court Judge is authorised to hold. This appears to have been the opinion of my brother Teetzel in the *Saltfleet* case:" pp. 521-2.

I am, however, bound to follow the decision of the Divisional Court in the *Saltfleet* case, and to hold that, upon a scrutiny of the ballot papers under sec. 371, the Judge has jurisdiction to enter upon an inquiry as to the right of the persons who have voted to vote.

Then comes the question as to the scope of the inquiry. It was held by Riddell, J., in *In re Armour and Township of Onondaga* (1907), 14 O.L.R. 606, following *Regina ex rel. McKenzie v. Martin*

(1897), 28 O.R. 523, that he had no power upon a motion to quash to examine "into the propriety of the various names being on the voters' list," and, if there was no power to do this on such a motion, *à fortiori* the County Court Judge has no such power upon a scrutiny of the ballot papers.

If there ever was any doubt upon the point, it has been removed by sec. 24 of the Voters' Lists Act, 1907, which makes the certified list final and conclusive evidence that all persons named in it, and no others, except such as come within the exceptions mentioned in the section which are applicable to a municipal election, "were qualified to vote at any election at which such list was, or was the proper list to be, used."

It is not open to doubt that the words "any election" apply to the taking of the vote of the electors upon a by-law which requires their assent before it is competent to the council finally to pass it, and, as I understand the *Saltfleet* case, the Divisional Court was of that opinion.

What, then, are the exceptions? They are enumerated in paragraphs 1, 2, and 3 of sec. 24, and are as follows:—

"1. Persons guilty of corrupt practices at or in respect of the election in question on such scrutiny, or since the list was certified by the Judge;

"2. Persons who, subsequently to the list being certified, are not or have not been resident either within the municipality to which the list relates, or within the electoral district for which the election is held, and who by reason thereof are, under the provisions of the Ontario Election Act, disentitled to vote;

"3. Persons who, under sections 4 to 7 of the Ontario Election Act, are disqualified and incompetent to vote."

The only one of these three paragraphs which, in my opinion, is applicable to a municipal election is paragraph 1.

Paragraph 2 is applicable to voting at elections under the Ontario Election Act, and to that only. This is manifest from the concluding words, "and who by reason thereof are, under the provisions of the Ontario Election Act, disentitled to vote."

Paragraph 3 is also applicable only to elections under the Ontario Election Act. That I should have thought clear from the language used, but, if it were open to a different construction, a consideration of the effect of treating it as applicable to a municipal election makes it clear that that was not intended.

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The Ontario Election Act mentioned in the section is R.S.O. 1897, ch. 9; and secs. 4 to 7 of it disentitle to vote:—

- (1) Judges and certain officials;
- (2) Persons not named in the proper voters' list;
- (3) Returning officers, election clerks, and certain other persons employed at the election, in reference to it, or for the purpose of furthering it;
- (4) Women;
- (5) Prisoners, patients in lunatic asylums, and persons maintained wholly or in part as inmates receiving charitable support or care in certain institutions.

Many of the persons disentitled to vote under the Ontario Election Act are not disentitled to vote at municipal elections, as will be seen by referring to Part II., Title II., "Division II.—Disqualification," of the Municipal Act.

Many officials disentitled to vote under the Ontario Election Act are not disentitled to vote at municipal elections; and some that are disentitled to vote at municipal elections may vote at elections under the Ontario Election Act. Some women may vote at a municipal election, but none at an election for the Legislative Assembly.

The persons mentioned under the fifth head, and some of those mentioned under the fourth head, are not disentitled to vote at municipal elections, and there are other differences which it is not necessary to mention.

In order to reach its conclusion the Divisional Court must have read into paragraph 2, after the word "relates" in the third line, some such words as "and who by reason thereof are under the provisions of the Municipal Act disentitled to vote;" and in order to reach his conclusion, as I shall later on point out, the County Court Judge read out of the paragraph the controlling words of it, "and who by reason thereof are, under the provisions of the Ontario Election Act, disentitled to vote."

In my opinion, no such "major operation," if I may be permitted to borrow that surgical term, was necessary for the interpretation of sec. 24. Though it deals with the effect of the voters' list as evidence upon a scrutiny, as well under the Municipal Act as under the Ontario Election Act, the section is to be read distributively, *reddendo singula singulis*, and only such of the ex-

ceptions as, in their nature or as described, are applicable to an election under the Municipal Act are to be applied to a scrutiny under that Act, and in like manner only such of the exceptions as are so applicable to an election under the Ontario Election Act are to be applied to a scrutiny under it.

I do not wish to be understood as expressing the opinion that, upon a proceeding to unseat a candidate who has been declared elected, or on a motion to quash a by-law, it would not be open to the Court to inquire whether a person whose name was entered on the voters' list had not, by something which had subsequently occurred, lost his right to vote, and, if that was found to be the case, to disallow the vote. I reserve my opinion as to such a case until it is presented for decision.

I am here again met with the decision in the *Saltfleet* case that upon a scrutiny of the ballot papers under sec. 371 a "subsequent change of residence, which would disqualify, may be investigated under sub-clause 2, but not a subsequent change of status:" *per* the Chancellor, at p. 302.

I have already indicated my reasons for differing from that view as to the effect of sec. 24 of the Voters' Lists Act, 1907, as applicable to a scrutiny of ballot papers under the Municipal Act, but my duty is to follow the *Saltfleet* case and not to give effect to my own opinion.

I come now to the course taken by the learned County Court Judge, and in dealing with it I have the benefit of a carefully prepared statement of his conclusions and of the reasoning upon which they are founded.

The learned Judge differs from the view enunciated by the Chancellor in the *Saltfleet* case, and concurred in by the other members of the Court, that it is only a subsequent change of residence which would disqualify that may be investigated. It was his duty, whatever may have been his own opinion, as it is my duty, to follow the *Saltfleet* case, and, in so far as it is shewn that he is entering upon an inquiry beyond the limits of his jurisdiction as determined by that case, it is the duty of the Court to interfere by prohibiting him from so doing.

The opinion of the learned Judge, as I understand, is that he may go beyond these limits, and that, where a person whose name is entered on the voters' list, at any time subsequent to its

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having been certified is not a resident within the municipality, the list as to him is not final and conclusive, but his right to be entered upon it may be questioned, and, if it appears that he had not that right, his vote may be disallowed, even in a case such as that of a freeholder where residence in the municipality is not required to entitle him to vote.

The error into which I venture to think the learned Judge has fallen is due, in the first place, to his divorcing the words in paragraph 2, "persons who subsequently to the list being certified are not or have not been resident within the municipality to which the list relates," from the subsequent words of the paragraph, which, in my view, plainly control them, "and who by reason thereof are, under the provisions of the Ontario Election Act, disentitled to vote." The learned Judge, if, as I think, in error as to this, errs in the good company of a Divisional Court, if I am right in my view as to the effect of the section. But not only does he err in that respect, but also in treating the mere fact that a person whose name appears on the list has subsequently not been a resident within the municipality to which the list relates, although such non-residence in no way affected his right to vote, as in the case of a freeholder under the Municipal Act, as taking away the conclusive character of the list and warranting an attack upon his right to be entered on it.

Such a view is, in my opinion, entirely opposed to the policy on which the Voters' Lists Act is based, which is, that the list is to be final and conclusive as to the right of every person whose name is entered on it to vote, unless, by something happening subsequently, such as change of residence, he has lost that right (par. 2), or unless he has been guilty of corrupt practices at the election at which he voted or since the list was certified by the Judge (par. 1), or unless he is a person incompetent or disqualified from voting under secs. 4 to 7 of the Ontario Election Act, par. 3 and par. 2 being, in my opinion, applicable only to elections under that Act.

To attribute to the Legislature the intention of opening the door to an attack on the voters' list simply because a person whose name is entered on it, whose right to vote is challenged, may have ceased temporarily, it may be, to reside in the municipality, where his ceasing to do so did not affect his right to vote, is not, I venture to think, very complimentary to the good sense of that body.

A reference to the sections of the Ontario Election Act, R.S.O. 1897, ch. 9, which deal with residence as affecting the right to vote (secs. 8 to 11), shews clearly, I think, the cases which par. 2 was intended to provide for, and that that want of good sense is not fairly chargeable to the Legislature.

Limiting the scope of the inquiry before the County Court Judge, as I have held it is to be limited, the question of his jurisdiction to deduct the bad votes from the number cast in favour of the by-law, as I understand the facts, becomes in this case academical, as, these being deducted, the majority is still sufficient to carry the by-law.

My present impression is, that—while a Court may have that power when dealing with a motion to quash—the jurisdiction of the County Court Judge being purely statutory, where the bad votes are sufficient in number that if cast for the by-law it would be defeated, he has not that power, and that his proper course is to certify the facts to the council; but, if the question is or becomes material in determining the fate of the by-law, I will hear counsel further as to it.

In the meantime, an order must go prohibiting the learned Judge of the County Court from entering upon any inquiry as to the right to vote of any person whose name is entered on the voters' list upon which the voting took place, unless, under the provisions of the Consolidated Municipal Act, 1903, subsequently to the list being certified, he had become, by change of residence, disentitled to vote; and there will be no order as to costs.

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March 23.

Contract—Joint Liability—Judgment against one Joint Contractor—Promissory Note—Right of Creditor against Co-contractor—Promise to Pay—Consideration—Forbearance—Knowledge of Material Facts—Partnership.

The defendant ordered goods from the plaintiffs in the name of a certain company, and for the purposes of the company, which was about to be formed by himself and three other persons. The company never came into existence, but one of the four concerned, C., established and registered a pseudo-partnership under the company name, he, C., being the sole member, as the defendant alleged. The goods ordered by the defendant were supplied by the plaintiffs, and C. gave a promissory note for the price, signed in the name of the company and his own name. This was not paid, and the plaintiffs recovered judgment in an action upon it against the company and C. After this, the judgment being unsatisfied, the plaintiffs called on the defendant to pay, and he promised to pay if time was given to him. At this time the defendant knew of the note, but not, as he said, of the judgment:—

Semble, that there was in fact a partnership as to the goods at the time they were purchased, and all four persons were jointly liable.

But *held*, apart from the fact of partnership, that the goods were ordered and purchased originally on the joint account of the intending partners, and all would be equally and jointly liable; therefore, the judgment obtained on the note of the partnership represented by C. alone could only be a judgment against one of the joint debtors, and would work no detriment to the right of the plaintiffs to recover from the defendant on the original liability. *Toronto Dental Manufacturing Co. v. McLaren* (1890), 14 P.R. 89, 92, distinguished.

Wegg Prosser v. Evans, [1894] 2 Q.B. 101, [1895] 1 Q.B. 108 (which overrules *Cambeport & Co. v. Chapman* (1887), 19 Q.B.D. 229), followed.

Held, also, that recovery against the defendant might rest on the new promise to pay, which was made for good consideration. Both parties knew all the material facts, and the fact that judgment was recovered on the note, whether known or not to the defendant, was not important, seeing that he knew how the note had been given.

Judgment of the County Court of York reversed.

AN appeal by the plaintiffs from the judgment of the County Court of York dismissing the action, which was brought in that Court to recover \$238.47 and interest.

The plaintiffs, by their statement of claim, alleged that in or about the months of April and May, 1908, they, at the request of the Non-Alcoholic Beverage Company, a partnership firm, the request being made by and through the defendant, did certain work for that company, and on or about the 30th May, 1908, sold and delivered certain goods to that company; that no part of the price of the goods had been paid to the plaintiffs, except the sum of \$80, for which they had given credit; that, at the time when the said work was requested and done and the said goods were sold and delivered, the plaintiff was a partner in that company.

By amendment, the plaintiffs alleged, in the alternative, that, at the time when the work was requested and done and the goods sold and delivered, the Non-Alcoholic Beverage Company was not in existence, and that the defendant was personally liable for the work done and the goods sold and delivered; and, in the further alternative, that the defendant, in consideration that the plaintiffs would forbear to commence an action against him for the price of the work and the goods, promised to pay the plaintiffs therefor, and the plaintiffs, in reliance on the promise of the defendant, did forbear to commence such action, but the defendant subsequently refused and had ever since refused to pay for the work and goods.

The defendant, by his statement of defence, alleged that he never was a partner in the Non-Alcoholic Beverage Company; and, if he ever was a partner, or liable as such, the plaintiffs, with knowledge that the defendant had ceased to be such a partner, accepted the promise of the remaining partner or partners for the debt sued for, and released the defendant from all liability therefor.

By amendment, the defendant alleged that the plaintiffs on the 13th November, 1908, obtained a judgment in default of appearance against the Non-Alcoholic Beverage Company in an action in the same County Court for the sums of \$239.33 and \$14.81, which sums included the amount claimed by the plaintiffs in this action; and the defendant alleged that the said judgment was a bar to the right of the plaintiffs to recover in this action.

Upon these pleadings and the evidence given at the trial before one of the Judges of the County Court, without a jury, the action was dismissed.

March 18. The appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ.

C. C. Robinson, for the plaintiffs. The facts are not in dispute, but the inference which the trial Judge draws from them, that the defendant was not a partner, is erroneous, and this Court can review his decision in that respect. It is submitted that the defendant was, under the admitted facts, a partner in respect of this transaction, or at all events a joint debtor; I refer to Lindley on Partnership, 7th ed., pp. 15, 18, and 231. It is true that the mere intention to become a partner does not have the effect of constituting the partnership, but the commencement of business crystallizes the in-

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tention into fact. The trial Judge further found that the judgment recovered by the plaintiffs against the partnership under their promissory note was a bar to the present action, but it is submitted that that is not the case: R.S.O. 1897, ch. 152, sec. 8, sub-sec. 1; *Kendall v. Hamilton* (1879), 4 App. Cas. 504. The judgment against the partnership was under a promissory note, while this action is for goods sold, being a different cause of action, and *Wegg Prosser v. Evans*, [1895] 1 Q.B. 108, is a case in point. The defendant is also liable on the ground of estoppel, as he held himself out as a partner, and the extension of time granted at his request was a good consideration for his promise to repay, even though as a matter of fact the plaintiffs could not at that time have recovered against him: *Cook v. Wright* (1861), 1 B. & S. 559; *Callisher v. Bischoffsheim* (1870), L.R. 5 Q.B. 449. [Counsel was stopped at this point by the Court.]

G. H. Kilmer, K.C., for the defendant. The alleged partnership was never formed in fact, so the defendant, if liable at all, was liable as an agent, and the judgment recovered against his principals is a bar to the action: *Isbester v. Ray* (1896), 26 S.C.R. 79. The action is not brought on the ground of estoppel, and, on that ground, the plaintiffs must fail: *Miles v. New Zealand Alford Estate Co.* (1886), 32 Ch.D. 266, at p. 283. The promise by the defendant relied on by the plaintiffs was merely to pay in so far as he was liable, and when judgment was taken against the partnership on the note, that was an election by the plaintiffs as to their remedy, by which they are bound: *Lindley on Partnership*, 6th ed., p. 260; *Evans v. Drummond* (1801), 4 Esp. 89; I refer also to *Byles on Bills*, 15th ed., p. 55, and cases there cited, especially *Thompson v. Percival* (1834), 3 N. & M. 67.

Robinson, in reply.

March 23. The judgment of the Court was delivered by BORD, C.:—I do not see how the defendant can escape from the payment of this liability. He is primarily liable, as he ordered and procured delivery of the goods sued for. Taking his own version of the case, he did this in the name of the Non-Alcoholic Beverage Co., and for the purposes of the company, which was then about to be formed by the junction of three others with himself. But, according to the defendant, this company never came into existence, though a form of

dissolution was gone through and papers signed to that effect, transferring all assets and liabilities to one of the four, named Craigie, who then on the 9th July, 1908, first established and registered a partnership under the above name, of which he was the sole partner. In pursuance of this form of dissolution, Craigie gave a note for the amount, signed by the company and himself, at three months, which has not been paid, but on which judgment was recovered on the 13th November, 1908. The plaintiffs called on the defendant to pay the claim, and upon an interview between them in May, 1909, the defendant admitted his liability, but sought forbearance, promising to pay it if time was given to him. The defendant sets up that he was discharged because of the note given by Craigie and accepted in satisfaction of the debt; and, secondly, as to the new promise in May, that he is not bound by it, because he was not told that judgment had theretofore been obtained on the note.

The judgment below has proceeded upon this ground as being an effective defence.

There was, as I judge, no concealment or want of knowledge of any material fact on the part of the defendant when he promised to pay this claim on being allowed some forbearance. He knew that the note had been given by Craigie in the name of the company, and, according to his evidence, he knew that it was given in payment, and he knew that he had requested or urged that it should be collected when overdue. If his knowledge was well-founded, then he had cause to believe that the taking of the note had discharged him; whereas, on the other hand, the plaintiffs did not attach any importance to the taking of the note, which they did not accept in satisfaction of the original claim for goods supplied—but only as collateral. There was no advantage taken of the defendant. Had he been told that judgment had been obtained on the note, it would not have given him any more enlightenment than he then had as to the legal situation. He may well have felt himself bound to pay for the goods he had himself ordered, and so made the promise which he now seeks to evade by a technical method of escape. I think the promise is binding upon him, and it was made for good consideration.

The same result follows if it be the fact that the plaintiffs knew, at the time the note was taken, that the defendant was not then and never had been a partner. The taking of the note would then

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have been evidence of an unequivocal discharge, and the subsequent judgment would not have added to that result. So that both parties would have had equal knowledge as to the relative status of all concerned.

I should be disposed to hold on all the evidence, and especially the documentary, that there was in fact a partnership as to these goods at the time they were purchased, and that all the four were jointly liable. But, apart from the fact of partnership, the goods were ordered and purchased originally on the joint account of the intending partners, and all would be equally and jointly liable: *Young v. Hunter* (1812), 4 Taunt. 582. Being a joint liability, the judgment obtained on the note of the partnership represented by Craigie alone, could only be a judgment against one of the joint debtors, and would work no detriment to the legal right of the plaintiffs to recover on the original liability as against Morley, the defendant.

The learned Judge seems to have been misled by placing his judgment on the doctrine of merger as expounded in *Toronto Dental Manufacturing Co. v. McLaren* (1890), 14 P.R. 89, 92. That case turned on merger, not on election, and was decided in 1890. The law was then as stated in *Cambefort & Co. v. Chapman* (1887), 19 Q.B.D. 229 (a case much like this on the facts), and the doctrine of *res judicata* there maintained was, that an unsatisfied judgment against one joint contractor on a bill of exchange given by him alone for the joint debt is a bar to an action against the other joint contractor on the original contract. But this was reversed in 1894 by the case of *Wegg Prosser v. Evans*, [1894] 2 Q.B. 101, and affirmed, [1895] 1 Q.B. 108, where it was held that an unsatisfied judgment against one joint contractor on a cheque given by him for the joint debt is not a bar to an action against the other joint contractor on the original contract. I cannot agree to the view that the original claim was in any sense affected as against the defendant by a judgment on the note against another also jointly liable.

The right to recovery may also well rest on the new promise to pay, made upon the urgency of the plaintiffs for a settlement in May, 1909. Both parties knew all the material facts, and the fact that judgment was recovered on the note, whether known or not to the defendant, was not important, seeing that he knew how the note had been given.

The judgment should be reversed and entered for the plaintiffs with costs below and in appeal.

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[IN THE COURT OF APPEAL.]

DREWRY V. PERCIVAL.

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Appeal—Jurisdiction of Court of Appeal—Order of Divisional Court on Appeal from Judgment of District Court—Amount Involved.

March 24.

The Court of Appeal has no jurisdiction to entertain an appeal from the order of a Divisional Court of the High Court made upon appeal from the judgment of a District Court, even where the amount involved exceeds \$1,000. There is one appeal only in all cases within the jurisdiction of the District Courts.

The provisions of secs. 9 and 10 of the Unorganized Territory Act and of secs. 50, 74, 75, 76, and 77 of the Judicature Act, considered.

AN appeal by the defendant George Percival from the order of a Divisional Court, 19 O.L.R. 463, dismissing that defendant's appeal from the judgment of the District Court of Rainy River in favour of the plaintiff for the recovery of \$1,039.61, after a trial without a jury.

February 4. The appeal came on for hearing before Moss, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

G. R. Geary, K.C., for the plaintiff, objected that an appeal to this Court did not lie.

W. N. Ferguson, K.C., for the defendant, in answer to the objection. The Unorganized Territory Act, R.S.O. 1897, ch. 109, is a remedial Act passed for the purpose of giving an additional right to litigants, and does not take away from a litigant such rights of appeal as are enjoyed by other litigants. Sub-sections 2, 3, and 4 of sec. 9 of this Act give the appellant the right to appeal to the Court of Appeal. When secs. 74, 76, and 77 of the Judicature Act are read along with the foregoing provisions of the Unorganized Territory Act, all the Court has to do to give effect to both Acts is to follow the words of sub-secs. 3 and 4 of sec. 9. The effect and meaning of the words of these two sub-sections is that for the pur-

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pose of all proceedings (which includes appeals), this judgment shall be considered as if it were a judgment of the High Court, and as if actually so made by removal by *certiorari* or otherwise; and if this were a trial in the High Court, then, under sub-sec. (b) of sec. 76 of the Judicature Act, the appellant, no doubt, had a right to appeal. See also sec. 15 of the Unorganized Territory Act and the following cases: *Central Trust Co. of New York v. Algoma Steel Co.* (1903), 6 O.L.R. 464; *Neely v. Parry Sound River Improvement Co.* (1904), 8 O.L.R. 128; *Coutts v. Wiarton Beet Sugar Co.* (1903), 39 C.L.J. 788; *Bank of Minnesota v. Page* (1887), 14 A.R. 347.

Geary, in reply. The enactment relied upon by the appellant, *viz.*, sub-sec. 3 of sec. 9 of R.S.O. 1897, ch. 109, does not give the right to appeal to the Court of Appeal. It gives merely a right to move in the High Court for what the party could otherwise move for in the District Court. It does not in any way give an appeal to the Court of Appeal, nor is it that sub-section which gives an appeal to a Divisional Court. Appeals to a Divisional Court are governed by the Judicature Act and by the County Courts Act. What is contemplated by this section is a motion such as R.S.O. 1897, ch. 55, sec. 51, sub-secs. 2, 3, and 4, provides for, that is to say, such a motion as could be made in a County or District Court. See *Bank of Minnesota v. Page*, 14 A.R. 347, at p. 350. Sub-section 4 does not create any further right, and merely prescribes the procedure to be followed when the party desires to avail himself of the preceding section. Assuming that the above-mentioned sections did give the right contended for, this right has been taken away by the express negative enactment, 4 Edw. VII. ch. 11. If the Unorganized Territory Act does give the right contended for, there is an inconsistency, and the last Act has to be obeyed. See the rule as stated by Lord Langdale, M.R., in *Dean and Chapter of Ely v. Bliss* (1842), 5 Beav. 574, at p. 582. Moreover, the Legislature must be presumed to have had in mind the provisions of R.S.O. 1897, ch. 109, at the time it passed 4 Edw. VII. ch. 11. See *Jones v. Brown* (1848), 2 Ex. 329, at p. 332. If the Unorganized Territory Act gives the appellant the right contended for, it gives that right by implication only, in which case the words of Farwell, L.J., in *In re Cannings Limited and London County Council*, [1907] 1 K.B. 51, at p. 68, would apply.

[The appeal was heard on the merits subject to the objection.]

March 24. OSLER, J.A.:—This was an action in the District Court of the District of Rainy River, which was tried without a jury in the month of July, 1909, before the Judge of that Court, who gave judgment for the plaintiff for \$1,039.60. An appeal from that judgment was heard before a Divisional Court of the High Court, and was dismissed in the following month of October. The defendant thereupon brought a further appeal to this Court, and the question is whether this Court has jurisdiction to entertain it.

Section 9 of the Unorganized Territory Act, R.S.O. 1897, ch. 109, sub-sec. 3, enacts that after a trial in an action for the recovery of land or in replevin where the value of the goods claimed exceeds \$200, or in any other case where the cause of action is beyond the jurisdiction of the County Courts, and a verdict or judgment exceeding \$200 is obtained, any party entitled to move to set aside such judgment or verdict may, instead of moving in the District Court, and without removing the cause into the High Court by *certiorari*, move in the High Court for such rule or order as he claims to be entitled to, in the same manner as if the action had been in the High Court and had been tried as a sitting thereof, and the judgment or order of the High Court shall be acted upon as if it were a judgment or order of the District Court.

And sub-sec. 4 enacts that, where a party is entitled and desires to move under sub-sec. 3, he shall notify the clerk of the District Court in writing to transmit the record of the pleadings and the exhibits at the trial to the Central Office of the High Court, and that, subject to any general Rules, the subsequent practice shall be the same as in case of a trial in the High Court.

Section 10 (2) provides for the transfer of the case to the High Court, enacting that the High Court or a Judge thereof may order the whole proceedings to be transferred to the High Court, and that, on this being done, the action is to be thenceforth continued and prosecuted in that Court as if it had been originally commenced therein; only such cases as involve value or damage to the amount of \$1,000, and appear also to be such as ought to be tried in the High Court, can be so removed: sub-sec. 4.

Section 74 of the Judicature Act, as enacted in 1904, 4 Edw. VII. ch. 11, provides that an appeal shall lie to a Divisional Court of the High Court in the several cases specified, *inter alia*, “(5) From a District Court, as provided in the Unorganized Territory Act.”

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Section 75 enacts that the judgment, order or decision of a Divisional Court shall be final and that there shall be no further appeal save at the instance of the Crown, and save as provided by secs. 50 and 76.

Section 50 confers jurisdiction on the Court of Appeal to hear and determine appeals from any judgment, order or decision, "save as in this Act mentioned," of a Divisional Court; and sec. 76 purports to define the several conditions or cases in which such appeal lies with leave or without.

If the sections I have referred to were the only sections dealing with the subject, it is probable that the appeal now in question would lie, the judgment appealed from being the judgment of a Divisional Court, and the matter in controversy on the appeal being more than the sum or value of \$1,000 (76 (b)); and appeals from judgments on County Court appeals in certain cases would also be open.

Section 77, however, stands in the way, expressly enacting that nothing in sec. 76 shall be construed so as to permit an appeal to the Court of Appeal from the judgment of a Divisional Court upon an appeal to such a Court in any of the cases mentioned in clauses 2 to 9, both inclusive, of sec. 74, except certain appeals from a Surrogate Court or Judge. Clause 2 of sec. 74 declares the jurisdiction of a Divisional Court to hear appeals from County Courts, "as provided in the County Courts Act;" and (as already mentioned) clause 5, of a similar Court to hear appeals from a District Court, "as provided in the Unorganized Territory Act." Neither of these Acts gives any further appeal.

The provision in sec. 9, sub-sec. 4, of the Unorganized Territory Act that the "subsequent practice" after motion in the High Court under the next preceding sub-section shall be the same as in case of a trial in the High Court, does not extend to confer the right of a further appeal, which must always be expressly given: see *Ahrens v. McGilligat* (1873), 23 C.P. 171; *Sandback Charity Trustees v. North Staffordshire R.W. Co.* (1877), 3 Q.B.D. 1, 4.

It may well be that if the case had been removed into the High Court by *certiorari*, or by order under sec. 10, an appeal to this Court would have lain from the judgment of the Divisional Court, but neither of those courses was adopted.

The case of *Bank of Minnesota v. Page*, 14 A.R. 347, cannot assist the appellant. Appeals from the Territories still follow the course of County Court appeals, which is now to the High Court, instead of, as was the law when that case was decided, to the Court of Appeal.

It is thus plain that the present appeal is not competent and must be dismissed.

MEREDITH, J.A.:—It may be, as Mr. Ferguson thinks, that the Legislature ought to have given a right of appeal to this Court from the judgment or order of a Divisional Court, made upon a motion to it under sub-sec. 4 of sec. 9 of the Unorganized Territory Act, or indeed that the Legislature intended to do so; but, on the other hand, it may be that, in conformity with the general principle it had clearly adopted, of allowing one appeal only in cases within the jurisdiction of the County and District Courts, its intention was that there should be no further appeal. But, however that may be, it is quite certain that such a right, involving the jurisdiction of this Court, ought to rest upon something much more substantial and certain than mere conjecture.

Sub-section (4) of sec. 9 of the Act—in these words, “Where a party is entitled and desires to move under the next preceding sub-section he shall notify the clerk of the District Court in writing to transmit the record or certified copy of the pleadings and any exhibits filed at the trial to the Central Office of the High Court at Toronto, and, subject to any general Rules, the subsequent practice shall be the same as in the case of a trial in the High Court”—affords the only ground for the contention that a right of appeal to this Court exists; but how can it be said that they convey any clear indication of intention to confer such jurisdiction upon this Court, and such a right upon the parties to the action? Neither this Court, nor any appeal, is mentioned; and “the subsequent practice” may very well mean the practice in the High Court after the transmission of the papers to the Central Office; indeed, how can they very well be interpreted as meaning anything more, or other, than that? The language of sub-sec. 2 of sec. 10 of the same Act strengthens this view; it provides for the transfer of the whole proceedings, in an action in the District Court, to the High Court, and for the further prosecution of it there as if commenced

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in that Court; but this, of course, can be done only on an order of the High Court, or a Judge of it. And it is still further strengthened by the fact that the motion in the Divisional Court is merely an optional one; if the alternative course be adopted—the ordinary appeal to the District Court—there could of course be no appeal to this Court. So that the result is, in accordance with the general principle, one appeal only in all cases within the jurisdiction of the District Court. The removal of the action into the High Court is, not an exception; it ceases to be a District Court, and becomes a High Court, case when so removed.

The words, and effect, of sec. 7 of the Act, under which the case of *Bank of Minnesota v. Page*, 14 A.R. 347, was decided, are obviously very different.

Apart from these considerations, there is nothing to indicate that the proceedings in the Divisional Court, in this case, were taken under sub-sec. 4 of sec. 9 of the Act; on the contrary, they seem to have been treated as an ordinary appeal from the judgment of the District Court under the provisions of sec. 7.

I would quash the appeal for want of jurisdiction.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

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[IN THE COURT OF APPEAL.]

REX v. HENRY.

Appeal—Jurisdiction of Court of Appeal—Case Stated by Magistrate—Summary Conviction under Provincial Act—Forum—Criminal Code, Part XV.—Ontario Summary Convictions Act.

The Court of Appeal has no jurisdiction to hear an appeal, upon a case stated by a magistrate, from a summary conviction, under the Ontario Summary Convictions Act, for the contravention of a provincial statute. Under Part XV. of the Criminal Code a case may be stated for the opinion of "the court," but that means, in Ontario, the High Court of Justice: sec. 705 (b); sec. 2 (35) (a).

Semble, per OSLER, J.A., that it is doubtful whether sec. 2 of the Ontario Summary Convictions Act, R.S.O. 1897, ch. 90, goes far enough to confer jurisdiction upon the High Court; and sec. 2 of 1 Edw. VII. ch. 13 (O.), purporting to amend sec. 8 of R.S.O. ch. 90, is inapplicable—the reference to the 8th line of sec. 8 being probably a mistake for the 12th line of sec. 2.

CASE stated by R. E. Kingsford, one of the police magistrates for the city of Toronto, by whom the defendant was convicted

for practising dentistry, contrary to the statute in that behalf, he not being a licentiate of the Royal College of Dental Surgeons of Ontario. Leave to appeal from the conviction was granted by the Court of Appeal, and the case was stated pursuant to the direction of the Court. The question submitted was: "Was the defendant properly convicted of an offence against the provisions of sec. 26 of the Act respecting Dentistry, R.S.O. 1897, ch. 178, on the admissions made by him?"

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February 9. The case was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

E. F. B. Johnston, K.C., and *G. Grant*, for the defendant.

I. F. Hellmuth, K.C., and *W. H. Price*, for the Royal College of Dental Surgeons of Ontario.

At the beginning of the argument the jurisdiction of the Court to hear the case was questioned by one or more of the Judges. The question of jurisdiction was not argued by counsel, and the hearing on the merits proceeded subject to the determination of that question.

March 24. OSLER, J.A.:—I regret to find that leave to appeal in this matter has been granted by inadvertence, and that we have no jurisdiction to hear the appeal.

Section 1013 of the Criminal Code enacts that an appeal from the verdict or judgment of any Court or Judge having jurisdiction in criminal cases, or of a magistrate proceeding under sec. 777, on the trial of any person for an indictable offence, shall lie upon the application of such person if convicted, to the Court of Appeal in the cases thereafter provided for, and in no others. These cases are: (1) where a question of law is reserved by the trial Court at the instance of the accused or the prosecutor or the Attorney-General or of the Court *proprio motu*; (2) where, in the event of the refusal of that Court to reserve it, the Court of Appeal, on motion, directs that a case by way of appeal shall be stated; and (3) where the trial Court gives leave to apply to the Court of Appeal for a new trial on the ground that the verdict was against the weight of evidence. Whether an appeal will lie after acquittal, I doubt, and am not yet satisfied that it will.

Here the accused was tried and convicted, not for an indictable offence, but for a contravention of the provisions of sec. 26 (1)

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of the Act respecting Dentistry, R.S.O. 1897, ch. 178, and the prosecution took place as the Act prescribes, and the conviction is a summary conviction, under the Ontario Summary Convictions Act. Nor can the case be treated as a case stated under Part XV. of the Criminal Code, which deals with the procedure in relation to summary convictions. Provisions are there found, secs. 761 to 769, by which a magistrate is empowered to state or may be compelled to state a case for the opinion of the court in the case of a conviction, order, determination, or other proceeding of a justice under that Part. "Court" in this group of sections means and includes "any superior court of criminal jurisdiction for the Province in which the proceedings in respect of which the case is sought to be stated are carried on:" sec. 705 (b). And "superior court of criminal jurisdiction" means and includes, in the Province of Ontario, the High Court of Justice for Ontario: sec. 2 (35) (a). The Court of Appeal, therefore, has no jurisdiction to entertain a case stated by a justice under Part XV., a jurisdiction which, if it exists at all in the case of proceedings under the Ontario Summary Convictions Act, R.S.O. 1897, ch. 90, is conferred upon the High Court alone by force of sec. 2 of that Act—though it is doubtful whether that section goes far enough to do so—or by the application of the relative sections of the Code which has been attempted to be made by 1 Edw. VII. ch. 13, sec. 2 (O.), to which we referred on the argument.* That section, it may be noted, amends sec. 8 of the Ontario Summary Convictions Act by inserting therein, in the 8th line, after the word "thereof," the words "including the practice and procedure as to the statement of a case for the opinion of the Court." Unfortunately, it seems not to have been observed that this section deals with an appeal from the conviction to the General Sessions, providing that "the practice and proceedings on the appeal and preliminary thereto, and otherwise in respect thereof," shall be the same as the practice and proceedings under the Dominion statutes which may be in force, on an appeal to the Sessions from a conviction made by a justice of the peace under a statute of Canada. Inasmuch, however, as the sections of the Code relating to the statement of a case are confined to proceedings before the justice alone, and are not extended to the proceedings in the appeal to the Sessions,

* See now the Ontario Summary Convictions Act, 10 Edw. VII. ch. 37.

the amendment inserted in the 8th section altogether fails of application. It looks very much as if the 8th section had been referred to by mistake, as the amendment would have fitted very well, and would have been effective, had it been inserted after the word "thereof" in the 12th line of the 2nd section.

On the whole, it seems to me that the only order we can make is to quash or dismiss the appeal.

MEREDITH, J.A.:—It seems to me to be quite plain that this Court has no jurisdiction in such a case as this, and that the reserved case, which the magistrate was required to state, should be remitted to him, because of such want of jurisdiction.

The conviction in question was a summary one, under a provincial enactment, and subject to the provisions of the Ontario Summary Convictions Act.

By sec. 8 of that enactment, as amended by 1 Edw. VII. ch. 13, sec. 2, it is provided—though, no doubt, in an awkward manner—that the practice and proceedings, as to the statement of a case for the opinion of the Court, in matters such as this, shall be the same as in like cases under federal enactment. Under federal enactment—the Criminal Code, sec. 764—a police magistrate, among other justices, may be required by "the court" to state a case, upon any question of law arising in any summary prosecution, for hearing and determination by such court.

Under sec. 705 of the Criminal Code, "the court" is "any superior court of criminal jurisdiction for the Province in which the proceedings in respect of which the case is sought to be stated are carried on." Under sec. 2 of the Criminal Code "(35) 'superior court of criminal jurisdiction' means and includes, (a) in the Province of Ontario, the High Court of Justice for Ontario." And under sec. 766 of the Criminal Code: "2. The authority and jurisdiction of the court for the opinion of which a case is stated may, subject to any rules and orders of court in relation thereto, be exercised by a judge of such court sitting in chambers, and as well in vacation as in term time." This is not unfamiliar practice; the only wonder is that the parties should have strayed out of the pretty well-worn way, into this Court, as if the case were one of a trial for an indictable offence.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

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March 24.

WRIGHT V. TORONTO R.W. CO.

Damages—Assessment by Jury—Personal Injuries—Quantum—Loss of Business Profits—Severance—Evidence—Remoteness—Amount of Damages Assessed Reduced on Appeal.

The plaintiff, a married woman, was injured while a passenger on one of the defendants' cars, by reason of the negligence of the defendants' servants, as found by a jury, who assessed her damages at \$1,900 for her injuries and \$600 for loss of business. The separation of the two items was made by the jury, and the Judge entered judgment for \$2,500:—

Held, notwithstanding the form of the judgment, that the Court was enabled, by the division made by the jury, to consider the propriety of the allowance made for loss of profits.

The plaintiff was fifty-six years old, and was in business as a baker. After her injury she sold the business. Some evidence was given as to profits being earned in the business at the time of the injury, but there was nothing to shew a reasonable certainty of future profits:—

Held, that the allowance for loss of profits was not supportable, the alleged damages being remote and conjectural, and the judgment should be varied by reducing the amount to \$1,900.

Held, as to the \$1,900, that the amount was not so large as to shew that the jury neglected their duty or were actuated by any improper motive or did not appreciate the grounds on which they might act in awarding damages. Judgment of BRITTON, J., varied.

APPEAL by the defendants from the judgment of BRITTON, J., upon the findings of a jury, in favour of the plaintiffs.

The action was brought by Susannah Wright and her husband to recover damages arising from an injury to her while a passenger on a street car in charge of the defendants' servants, the plaintiffs alleging negligence in the operation of the car.

The appeal was confined to the question of the damages awarded to the wife, the jury having found \$2,500 damages for the wife, \$1,900 generally and \$600 for loss of business, and \$100 for the husband, and judgment having been entered for the plaintiffs for these amounts.

January 17. The appeal was heard by MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.

D. L. McCarthy, K.C., for the defendants. The sum of \$1,900 allowed to the plaintiff Susannah Wright by the jury for personal injuries is an excessive amount. The jury must have given damages for pain and suffering. The \$600 for loss in business is for a cause too remote, and the question of damages for loss of business should have been withdrawn from the jury, as there was no evidence on which a jury could come to a conclusion as

to what might or might not have been the results had she continued in business.

John MacGregor, for the plaintiffs. The jury being the proper forum to assess the damages, the verdict, being such as a reasonable jury might have found, should not be interfered with: *Metro-politan R.W. Co. v. Wright* (1886), 11 App. Cas. 152, at p. 156; *Cox v. English Scottish and Australian Bank*, [1905] A.C. 168; *Dublin Wicklow and Wexford R.W. Co. v. Slattery* (1878), 3 App. Cas. 1155; *Basso v. Grand Trunk R.W. Co.* (1905), 6 O.W.R. 893; *Lambkin v. South Eastern R.W. Co.* (1880), 5 App. Cas. 352. There is nothing to shew that the jury were misled, or calculated the damages on some wrong principle: *Johnston v. Great Western R.W. Co.*, [1904] 2 K.B. 250, at p. 254; *Cossette v. Dun* (1890), 18 S.C.R. 222, at p. 256 and 257. The damages are not excessive: *Hockley v. Grand Trunk R.W. Co.* (1905), 10 O.L.R. 363.

March 24. OSLER, J.A.:—The only question in this case is whether the Court can interfere with the judgment as regards the damages, which have been assessed in all at the sum of \$2,500, of which \$1,900 were given for personal injuries and the physical damage and suffering sustained by the plaintiff, and \$600 for business loss. This was ascertained by the answer of the jury to a question put to them by the learned Judge before the verdict was recorded, and it was expressly stated to them by him that the reporter would note how the damages were divided by them, so that if there were any questions of law they—the jury—would assess the damages \$1,900 generally and \$600 for loss of business to the female plaintiff. It must be taken that the jury assented to this. And the fact that the Judge entered judgment generally, by adding these two sums, for \$2,500, cannot affect the right of the defendants to object that, as a matter of law, upon the evidence, the item of damage for loss of business is not recoverable. In my opinion, that claim is quite unsupported by the evidence. It is purely conjectural, and, as attempted to be supported, too remote to justify the finding.

As to the other head of damage. There was evidence of negligence, hardly combatted, resulting in an accident to the plaintiff which has caused her great pain and suffering. I think, upon the evidence, the jury were quite justified in taking a view of it

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more serious than that which the defendants pressed upon them and urged again before us on the hearing of the appeal. It is impossible for me to say that the damages awarded are so large as to shew that the jury neglected their duty or were actuated by any improper motive or did not appreciate the grounds on which they might act in awarding them.

The judgment will, therefore, be varied by deducting the sum of \$600 for loss of business, and reducing the damages to \$1,900, for which sum the judgment will stand.

GARROW, J.A.:—Appeal by the defendants from the judgment at the trial before Britton, J., and a jury, in favour of the plaintiffs.

The action was brought by the plaintiffs, husband and wife, to recover damages in respect of an injury to the female plaintiff while a passenger on a street car in charge of the defendants' servants.

There was evidence of negligence which could not have been withdrawn from the jury, and the only question on the appeal is as to the \$600 damages allowed by the jury for loss of business.

The female plaintiff is fifty-six years of age. After keeping boarding-houses in various parts of the city with little financial success, she, on the 1st May, 1908, commenced, on little or no capital, a bakery business in Queen street, where she remained till the following February, when she commenced the business at the "Beach," as it is called, in which she was engaged at the time of the accident. The business in Queen street did not pay, neither did the business at the "Beach," until summer arrived, and with it the summer visitors to the Beach, who were the chief customers.

After the accident the female plaintiff sold the business to one James Ridley, a practical baker, which the female plaintiff was not, for \$525, of which \$328 was the estimated value of fixtures, and the balance was in the nature of goodwill. This, as stated by Mr. Ridley, and not contradicted, was a fair price. The sale took place, upon the evidence, because the female plaintiff did not feel able to continue the business.

Some evidence was given as to profits which it was said were being earned in the business at the time of the injury, that is, after the summer trade began, but the accounts are very defective in not shewing the expenditure, or making any allowance for the

labour of the other members of the family (husband, son, and daughter), all of whom were engaged in assisting the female plaintiff, and without whom or some similar help the business could not have been carried on.

Britton, J., in charging the jury on this subject, said: "Now, I do not know that I need go into details in reference to that business; if there is loss of business clearly attributable to this accident, then she is entitled to recover; but how you are to say and to measure accurately that loss is somewhat difficult. She says that her profits were from the time she went into business until she sold out, beginning with nothing or beginning with less than nothing, because she started on a loan of \$100—it had reached a point when she was able to sell it out for \$525—part of that \$525 representing the goodwill, and \$300 odd dollars representing what may be called the plant in the baker's shop."

To this part of the charge objection was taken by counsel for the defendants, upon the ground that such damages were too remote. The jury returned into Court with their verdict in writing, signed by them all, in which they stated that "Mrs. Wright was injured by the negligence of the Toronto Street Railway Co., and awarded to Mrs. Wright the sum of \$1,900 for such injuries, also \$600 for loss of business, making a total of \$2,500." And apparently, before the written verdict had been seen, this took place:—

"His Lordship: How did you arrive at the \$2,500 for the female plaintiff—what proportion did you allow for her injuries and what amount for business loss?

"The Foreman: \$600 for business and \$1,900 for injuries.

"His Lordship: The reporter will note how you will divide the damages, so that if there are any questions as a matter of law, you will assess the damages, \$1,900 generally and \$600 for loss of business, to the female plaintiff.

"Mr. MacGregor: My Lord, I move for judgment on the finding of the jury.

"His Lordship: There will be judgment entered for the female plaintiff for the sum of \$2,500 and for the male plaintiff for \$100, with costs. Thirty days' stay."

This clear division, upon the record of the proceedings, of the ordinary damages from the special damages concerning which

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the question is now raised, enables us, in my opinion, notwithstanding Mr. MacGregor's objections, to consider the propriety in law of the allowance of such special damages, without otherwise disturbing the judgment. And, in my opinion, the defendants' objection is well founded and must prevail. Loss of future profits is always very debateable ground. There is, I think, no absolute rule of law against their recovery upon the mere ground of remoteness. It is rather, I think, a question in each case of proof. See *Hoey v. Felton* (1861), 11 C.B.N.S. 142; *Lancashire and Yorkshire R.W. Co. v. Gidlow* (1875), L.R. 7 H.L. 517, at p. 525; *Bradshaw v. Lancashire and Yorkshire R.W. Co.* (1875), L.R. 10 C.P. 189, at p. 195; *Wilson v. Newport Dock Co.* (1866), L.R. 1 Ex. 177; *Masterton v. Village of Mount Vernon* (1874), 58 N.Y. 391.

Such proof is, of course, more easily forthcoming in the case of professional persons, or of others who have incomes from their personal exertions, more or less fixed and established. And even in the case of persons engaged in commerce it is not that circumstance alone which excludes, as it often does, a consideration of future profits in such a case as this, but the difficulty of proving that future profits are so reasonably certain to be earned as to justify a jury in finding the fact to be established. A jury must not merely guess, but must act upon reasonably sufficient evidence. And the plaintiffs' misfortune in this case is the total absence, in my opinion, of any such evidence. The business had practically just been commenced. It was begun without capital, and depended for what little success it had upon the ephemeral summer trade and upon the combined exertions, not of the female plaintiff alone, but of the other members of her family. None of them were bakers by trade nor apparently persons of any large experience. And, however industrious and capable the female plaintiff may have been, it is impossible upon the evidence to say with the slightest certainty that by the end of the year, or in the succeeding years, she was reasonably certain to have realised a profit of any kind or extent.

For these reasons, I am of the opinion that the appeal must be in part allowed and the judgment in favour of the female plaintiff reduced by the sum of \$600 without costs.

Moss, C.J.O., and MACLAREN, J.A., concurred.

[IN THE COURT OF APPEAL.]

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March 24.

Evidence—Admission of Fresh Evidence by Divisional Court on Appeal—Con. Rule 498—Materiality—Conclusiveness—Remissness in not Adducing Evidence at Trial—Mistake in Books—Alteration of Order before Issue.

Where the order of a Court upon an appeal has not been issued, the appeal is still pending and within the control of the Court, and the Court is at liberty, of its own motion or on application, to recall the opinion which has been pronounced, and, on a proper case, to admit further evidence for the purpose of the appeal, under Con. Rule 498.

The rule which governs the admission of new evidence upon appeal is fenced round with strict limitations. There must be no remissness in adducing all possible evidence at the trial; the new evidence must be practically conclusive; merely corroborative evidence, evidence to admit which would be merely setting oath against oath, evidence obtained under suspicious circumstances, or evidence which might merely enable an opponent's witness to be cross-examined more effectively, will not do; as a rule, the evidence must be of some fact or document essential to the case, of the existence or authenticity of which there is no reasonable doubt, or no room for serious dispute.

Young v. Kershaw (1899), 81 L.T.R. 531, and *Murray v. Canada Central R.W. Co.* (1882), 7 A.R. 646, specially referred to.

After an order had been pronounced by a Divisional Court reversing the judgment in the plaintiff's favour of an Official Referee in an action to enforce a mechanic's lien, but before the order had issued, the plaintiff applied for leave to adduce fresh evidence to shew that, by a mistake of his book-keeper, certain items in respect of materials furnished had been charged as extras, whereas in fact the materials had been furnished under the contract. The Divisional Court allowed the evidence to be given, and, although it had always been in the possession of the plaintiff, there being no suspicion of bad faith, credited it, recalled the order pronounced, and substituted an order affirming the judgment of the Referee—the evidence being conclusive upon the question involved in the appeal:—

Held, that the discretion of the Court was properly exercised.
Order of a Divisional Court, 19 O.L.R. 428, affirmed.

APPEAL by the defendants the trustees of the Annette Street Methodist Church from the decision of a Divisional Court, 19 O.L.R. 428, affirming (with a slight variation) the judgment of Mr. J. A. C. Cameron, an Official Referee, in favour of the plaintiff in an action to enforce a mechanic's lien.

The Divisional Court on the 30th June, 1909, pronounced an order varying the judgment of the Referee, but on the 27th September, 1909, upon fresh evidence adduced, substituted for the order at first pronounced the order now appealed against, holding, as to the plaintiff's whole claim, that the action had been duly brought within the time prescribed by sec. 22 of the Mechanics' Lien Act.

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February 11. The appeal was heard by Moss, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

G. F. Shepley, K.C., for the appellants. The trial before the Referee was on a clearly defined issue, and the new evidence which it is sought to admit could have been discovered and presented at the trial if reasonable diligence had been used by the plaintiff. It is not necessary to challenge the *bona fides* of the plaintiff, but it would be a dangerous precedent if parties who have acted in such a negligent way should be allowed to reopen their case. The judicial discretion exercised by the Court below in admitting the new evidence is subject to review by this Court: *Trumble v. Hortin* (1895), 22 A.R. 51; *Murray v. Canada Central R.W. Co.* (1882), 7 A.R. 646. A leading case on the subject is *Dumble v. Cobourg and Peterborough R.W. Co.* (1881), 29 Gr. 121, where Ferguson, J., at p. 132, quotes with approval Lord Kingsdown's words in *Hosking v. Terry* (1862), 15 Moo. P.C. 493: "The party who applies for permission to file a bill of review, on the ground of having discovered new evidence, must shew that the matter so discovered has come to the knowledge of himself and of his agents for the first time since the period at which he could have made use of it in the suit, and that it could not, with reasonable diligence, have been discovered sooner." To the same effect, Collins, L.J., says in *Young v. Kershaw* (1899), 81 L.T.R. 531: "It is a matter of the greatest importance, and has always been so treated by the Courts, that all material evidence, which could with reasonable skill and diligence be produced at the trial, shall be the only evidence which can be considered, and must be adduced at the trial. It is obviously in the public interests that parties, who have gone through the ordeal of litigation and have had their rights settled at the trial, should not afterwards be allowed to patch up the weak parts and fill up the omissions in their case by means of fresh evidence." The facts of the present case bring it clearly within the principle of these authorities.

J. Bicknell, K.C., and *G. M. Gardner*, for the plaintiff. The facts are absolutely clear which shew the nature and origin of the mistake made by the plaintiff's book-keeper in giving his evidence at the trial. The evidence of the books was all that was given there, and there was no conflict as to that. All parties took the books for granted, and the plaintiff should not now be

precluded from shewing, as he clearly is in a position to do, that the books were wrong on the point in question, and that on the true state of the facts he is entitled to recover. We admit that we made a mistake, and have to pay for it. All we ask is that the Court should not shut out the truth. That was the view of the Divisional Court, and it is submitted that they were right. The matter is an interlocutory one, and therefore not appealable: Judicature Act, sec. 73; *Blakey v. Latham* (1889), 43 Ch. D. 23. On the admission of new evidence, I refer also to *Blue and Deschamps v. Red Mountain R.W. Co.*, [1909] A.C. 361, at p. 366. In the *Trumble* case relied on by the appellants, Osler, J.A., says, at p. 52, that in a proper case the strict rules formerly acted upon may be relaxed. In that case the rule was not relaxed, but there it was a question of admitting corroborative evidence, while here the case is exactly opposite. In any event, the judgment of the Referee was right, and the Court should find in favour of the plaintiff on that ground: *Dempster v. Wright* (1900), 21 C.L.T. Occ. N. 88; *Barrington v. Martin* (1908), 16 O.L.R. 635. [MEREDITH, J., referred to *Morris v. Tharle* (1893), 24 O.R. 159.]

Shepley, in reply, argued that the rule which the Court was asked to apply tended to the maintenance of the general standard of justice, although it might operate hardly in individual cases. It was not competent for the respondent to attack the judgment of the Divisional Court, which was practically an order for a new trial, on the ground that the decision of the Referee was right. In any case, the judgment of that Court was right on the facts as then submitted to them, and should be supported on the grounds and authorities relied on by them.

March 24. OSLER, J.A.:—This was an action for the enforcement of a mechanic's lien, tried before an Official Referee, who gave judgment for the plaintiff.

The action was commenced on the 3rd or 4th November, 1908.

The claim for the lien was not registered.

It appeared that the defendant Michael had entered into a contract with the defendants the trustees of the Annette Street Methodist Church for the erection of a building on the land sought to be charged, and that on the 8th April, 1908, the plaintiff had contracted with Michael to furnish him with a quantity of specified materials to be used in its construction for the sum of \$1,700.

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The statement of claim in the action set forth the particulars of the claim for lien as the amount of the contract price and of a "bill of extras," amounting to \$75.17, furnished between the 1st August and the 8th October, 1908. The sum of \$700 had been paid on account, and the demand in the action was for the balance of the contract price and the extras. The last two items of the latter, amounting to \$4.75, consisted of a charge for three doors of described dimensions, the date of furnishing which was given as the 8th October, 1908.

The amount of the claim was really not disputed, being proved in a merely informal way by reference to the plaintiff's book, and the contest before the Referee appears to have turned wholly upon the question whether the plaintiff had thirty days from the furnishing and delivery to the defendant Michael of the last material to be used in the building, namely, the extras, as distinguished from the last delivery of materials under his contract, within which to commence proceedings for the enforcement of a lien for the balance of the contract price and the extras furnished under separate orders. The Referee held that the thirty days ran from the 8th October, when, as stated in the particulars, the last extra had been furnished, and declared the plaintiff entitled to a lien for the whole balance of his claim.

On appeal the Divisional Court was of opinion that as to the balance of the contract price the time ran from the delivery of the last material to be supplied under the contract—found in the books to have been the 16th (or the 8th) September—and that the lien was, therefore, enforceable to the amount of the extras only.

Before the order of the Court was drawn up, the plaintiff applied for leave to give further evidence for the purpose of shewing that the last two items in the bill of extras for the doors delivered on the 8th October had been entered in his books and charged as extras in error, whereas they were in fact part of the material to be supplied on the \$1,700 contract, and had been so supplied in completion of that contract. The Court admitted the evidence, and, being satisfied of its truth, recalled the opinion formerly given, and, with a slight variation, affirmed the judgment of the Referee, holding, as to the whole claim, that the action had been duly brought within the time prescribed by the 22nd section of the Act.

The defendants the trustees appeal from this judgment, contending that no proper case for the admission of the new evidence was made out; that it could with reasonable diligence have been discovered before the trial; and that the plaintiff, by his own negligence and by the manner in which his case was presented on the pleadings and at the trial, was precluded from opening it and from being allowed to adduce the evidence proposed.

It is unnecessary to cite authorities to shew that, the order on the appeal not having been issued, the appeal was still pending and within the control of the Court, and that the Court was at liberty, of its own motion or on application, to recall the opinion which had been pronounced, and, on a proper case, to admit further evidence for the purpose of the appeal, under Con. Rule 498,* which Rule, and not Con. Rule 642, was the one applicable to the case. The latter relates to the case of a proceeding which has passed into judgment and the reversal or variation of the effective judgment or order—the formal judgment or order—of the Court.

There is no doubt that the rule which governs the admission of new or further evidence is rightly fenced round with strict limitations. The parties should come to the trial prepared with the evidence upon the issues to be tried; and to open the door wide to enable them to make good a case defectively presented would lead to abuses such as the prolonging of litigation and opportunities for fraud. In *Dinsmore v. Shackleton* (1876), 26 C.P. 604 (C.A.), *Murray v. Canada Central R.W. Co.*, 7 A.R. 646, and *Trumble v. Hortin*, 22 A.R. 51, this Court has spoken on the subject with no uncertain sound, and the practice has been more recently stated in such cases as *Turnbull v. Duval*, [1902] A.C. 429, and *Young v. Kershaw*, 81 L.T.R. 531 (C.A.). There must have been, as is said in the last case, no remissness in adducing all possible evidence at the trial, and, “as to the class of evidence, it must be such that if adduced it would be practically conclusive—that is, evidence of such a class as to render it probable almost beyond doubt that the verdict would be different.” Merely corroborative evidence, evidence to admit which would be merely setting oath against oath, evidence obtained under suspicious

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*498.—(1) In all appeals, either to the Court of Appeal or to the High Court or a Judge . . . the Court or Judge appealed to shall have . . . full discretionary power to receive further evidence upon questions of fact; . . .

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circumstances, or evidence which might enable an opponent's witness to be cross-examined more effectively, will not do. It must, as a rule, be "of some fact or document essential to the case, of the existence or authenticity of which there is no reasonable doubt, or no room for serious dispute:" *per* Spragge, C.J.O., in *Murray v. Canada Central R.W. Co.*, 7 A.R. 646, at p. 655.

In the present case the only difficulty I have felt arises out of the first branch of the rule, *viz.*, whether the plaintiff had not been guilty of such default or remissness in the conduct of his case as to disentitle him to relief, the evidence he sought to adduce having always been in his possession. But as to this the issue which was really presented for trial must be considered. The plaintiff, not unnaturally, stated and put forward his claim as it appeared on his books. There was no inquiry into or dispute as to items, and the only witness, the book-keeper, testified merely to the book entries. From these it was assumed or would appear that the contract had been completed on the 8th or 16th September, and the only question considered was whether, upon the proper construction of the Act, the thirty days within which the action should have been brought to establish the lien ran from the delivery of the last items of the extras, as they were then supposed to be, for materials supplied for use in the building, so as to draw in the claim for the balance due on the contract.

On this question the Divisional Court differed from the Referee, but there was nothing at the trial to suggest the question whether the items referred to were not part of the contract so as to make the date of their delivery important in fixing the date of the commencement of the time-limit. The Divisional Court was of opinion that the delay and default were excused, and admitted the subsequently discovered evidence of error in charging the contract items of the 8th October as extras. I do not see how we can hold that the Court was wrong in doing so and in allowing the plaintiff to make the necessary amendments, assuming that the evidence itself was of such a character as to make it admissible within the rule I have referred to. As to this, the affidavits, supported by the documentary evidence, shew—and the deponents were not cross-examined—that the items in question were in fact furnished on the \$1,700 contract, and that the error in charging

them as extras instead of to the contract was that of the plaintiff's clerk or bookkeeper. Even suspicion of bad faith is absent—indeed, is not suggested—and for myself I cannot see that there is room for doubt that, if this evidence had been before the Referee, the issue would have taken quite a different shape, and must have been decided in favour of the plaintiff.

The position of no one has been altered. In my opinion, no more than justice has been done, and the appeal should be dismissed with costs.

MEREDITH, J.A.:—The power of the Divisional Court, to make the order now appealed against, is not questioned; all that is said against it is that that power was wrongly exercised.

That the Divisional Court had power to make the order, I have no doubt; but not, as the parties seem to have treated it, as an application in the nature of a bill of review under Con. Rule 642—an application which would not be made to a Divisional Court.

The action was one to enforce a mechanic's lien, and it had been tried by an Official Referee under the provisions of the Mechanics' and Wage-Earners' Lien Act; not in the ordinary way by Judge or jury. An appeal from this judgment was taken to the Divisional Court, and, whilst that Court was yet seised of the case—no formal order having been made upon the appeal—the respondent applied to reopen it, and gave further evidence, on the ground that a very material mistake had been made in the evidence adduced in his behalf at the trial; the application to reopen the matter in the Divisional Court was granted, and additional evidence was there given, which, if uncontradicted, made a very clear case of mistake, and miscarriage of justice by reason of it. The Divisional Court offered the appellants a new trial, which was declined; and thereupon gave judgment in the respondent's favour upon the new evidence; and I am unable to see anything irregular or improper in that, the Court having fully protected the appellants against all the consequences, in costs, of the mistake.

It is quite clear that the case is not one in which the respondent would have been entitled to a new trial, on the ground of newly discovered evidence, by reason of his lack of diligence and care—indeed his great negligence in regard to the evidence, before and at the trial; but it seems to me that it is equally clear that the

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Court was not precluded from directing a new trial—was not precluded from reversing a judgment, which was manifestly wrong, upon the appellants refusing to take a new trial; it would be a parody of justice, if, in a case where all parties virtually admitted that the respondent ought to have succeeded upon the very truth of the matter, the Court were powerless to right the wrong, although yet fully possessed of the case, upon an appeal against the judgment.

If the case were one of a doubtful or contentious nature, the danger of allowing a party to bolster up his case ought to preclude a reopening of the matter; but different considerations apply in a case such as this, in which it is virtually demonstrated that the wrong party will succeed if the new evidence be discarded.

Nor can I think that any arrangement made between the other parties to the action, whilst the respondent was still insisting upon the full measure of the relief which he was seeking, can properly form any bar to that relief being given.

I would dismiss the appeal.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

[IN THE COURT OF APPEAL.]

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TOWNSHIP OF EAST GWILLIMBURY V. TOWNSHIP OF KING.

Municipal Corporations—Agreement between Municipalities—Building and Maintenance of Highway—Right to Enforce—Absence of By-law and Corporate Seal—Payment of Money—Executed Contract—Taking Benefit—Recovery of Money Paid—Failure of Consideration.

The plaintiffs, a township corporation, alleged an agreement with the defendants, the corporation of an adjacent township, that, in consideration of the plaintiffs opening and building a road through the plaintiffs' township to a point agreed upon in the boundary line between the two townships, and agreeing to maintain the same thereafter as a public highway, the defendants would open and build and thereafter maintain a public road or highway, in continuation of the plaintiffs' road, through the defendants' township. The plaintiffs then alleged that, relying upon this agreement, they built their road, expending thereon large sums of money, but the defendants refused to build the continuation, without which the plaintiffs' road was useless; and they claimed specific performance of the agreement, a mandamus requiring the defendants to build the road, or damages.

There was no contract under seal or by-law of the defendants, but the plaintiffs relied on a resolution of the defendants' council authorising the building of the continuation of the road, upon condition of the plaintiffs contributing \$100 towards the cost, which the plaintiffs did:—

Held, that the plaintiffs were not entitled to specific performance, or to a mandamus, or to damages; for, assuming in their favour that an agreement was proved, in its nature within the proper competence of the defendants' council, and a performance to the extent alleged by the plaintiffs on their part, it was not a case where a contract had been fully executed by the plaintiffs of which the defendants had had the benefit, as in *Bernardin v. Municipality of North Dufferin* (1891), 19 S.C.R. 581; *Canadian Pacific R.W. Co. v. Township of Chatham* (1896), 25 S. C. R. 608; and *Lawford v. Billericay Rural District Council*, [1903] 1 K.B. 772.

The plaintiffs were *held* entitled to recover the \$100 paid, as upon a consideration which failed.

Judgment of MACMAHON, J., affirmed.

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ACTION for specific performance or a mandamus to compel the defendants to carry out an alleged agreement to build and maintain part of a highway, or for damages. The facts are stated in the judgments.

May 19 and 20, 1909. The action was tried before MACMAHON, J., without a jury, at Toronto.

McGregor Young, K.C., and *T. H. Lennox*, K.C., for the plaintiffs.

H. L. Drayton, K.C., and *A. B. Armstrong*, for the defendants.

June 3, 1909. MACMAHON, J.:—The second clause of the prayer asks for a mandatory order compelling the defendants to build and maintain as a public highway that portion of the highway within the limits of the defendants' township, from the terminus thereof at the boundary line, in continuation of the highway built by the plaintiffs to the toll road, south of the village of Bradford, within said limit.

The allegations in the statement of claim (paragraph 2) are that about the 14th day of July, 1905, representatives of the municipalities of the townships of King, West Gwillimbury, and East Gwillimbury, and the village of Bradford, met by appointment at the village of Holland Landing, and considered the advisability of opening and building a public road between the village of Queensville, in the county of York, and the said village of Bradford, in the county of Simcoe, and running through the said townships.

3rd. It was decided at said meeting, the representatives of the defendants concurring and agreeing thereto, that the said highway would be to the advantage and best interests of the several municipalities and the inhabitants thereof, and that the necessary steps should be taken by the said municipalities to build and open the same as soon as possible.

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4th. Subsequently, about the month of September, 1907, the defendants duly entered into an agreement with the plaintiffs that, in consideration of the plaintiffs opening and building the said road through and within the limits of the plaintiffs' township to a place agreed upon on the boundary line of the township of King, and thereafter maintaining the same as a public highway, the defendants would open and build and thereafter maintain a public road or highway, in continuation of such road, and running through and within the limits of the defendants' township from such place on the boundary line to the toll road within such limits, and leading to the village of Bradford.

The plaintiffs allege that, relying on the said agreement, the said road was opened up and built within the limits of the plaintiffs' township, and large sums of money were expended thereon, but the defendants refused to build that portion of the highway within the limits of the defendants' township.

A meeting took place in July, 1905, between members of the different municipal councils, as mentioned in paragraph 2 of the statement of claim, and, after consideration, the representatives thought it advisable to build the new road.

In 1906 the council of East Gwillimbury had a meeting with the municipal council of King, but nothing was put in writing.

William G. Hill, the deputy reeve of East Gwillimbury, said that the plaintiffs commenced work early in the year 1906, and to a great extent the moneys were spent on the work during that year; the road was not opened up to the town line of King until late in the autumn of 1907.

In 1907 the members of the council of East Gwillimbury met with the council of King, when the latter council passed a resolution to build what was the portion of the road through the township, if East Gwillimbury would contribute \$100 towards the cost of the work. When the members of the council of East Gwillimbury returned, they reported advising the council of their township to pay the \$100, and in October, 1907, a resolution was passed by the council of East Gwillimbury agreeing to pay \$100, a copy of which was forwarded to the council of King.

Both John Smith, the reeve, and Hill, the deputy reeve, of East Gwillimbury, said that the money spent by that township

on the road would not have been spent but for the assent given by the representatives of King to the undertaking for the benefit of both townships.

The only point for decision is, whether the municipality of King have done any act binding on them as a corporation which entitles the plaintiff municipality to a mandamus to compel the corporation of King to build the one-time projected road through the township.

Notwithstanding the forcible and well-reasoned argument of Mr. Young, I do not think that the action can succeed.

The powers of a municipal council shall be exercised by by-law when not otherwise provided for: R.S.O. 1897, ch. 223, sec. 325.

It is true that in *Bernardin v. Municipality of North Dufferin* (1891), 19 S.C.R. 581, the municipality was held liable on an executed contract for the performance of work within the purposes for which the corporation was created, which work it had adopted and of which it had received the benefit, though the contract was not executed under its corporate seal. To the like effect is *Canadian Pacific R.W. Co. v. Township of Chatham* (1896), 25 S.C.R. 608, and *Pim v. County of Ontario* (1860), 9 C.P. 304.

In these cases of executed contracts the work was within the purpose for which they were created, and they had respectively received the benefit of the work performed.

On the 16th October, 1907, the clerk of King sent a copy of the resolution (already referred to) of the council to the township of East Gwillimbury, and asked for a copy of the resolution passed by East Gwillimbury, which was forwarded and is as follows:—

“Motion passed October 11, 1907.

“That whereas Councillors Hill and Thirsk, a delegation from this council, interviewed the council of King in reference to the completion of the Queensville and Bradford road by the construction of the said road through the said township (of King); and whereas the council of King passed a resolution agreeing to complete said road, on condition that East Gwillimbury made them a grant of \$100 to aid in said construction. Therefore be and the said condition is hereby accepted, and the reeve is authorised and instructed to issue his order on the treasurer for the payment of \$62.50 to the treasurer of King, and that the payment of \$37.50 due from the township of King to the township of East Gwillim-

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bury on account of the purchase of a certain roadway from J. A. Cody on lot 101, con. 1, west, be and the same is hereby cancelled. And that the corporate seal be hereto attached."

John A. M. Armstrong, who was reeve of King in 1908, said the township would have been willing to build the portion of the road through the township, had Mr. Holtby, who was in that year the owner of lots 19 and 20 in the 2nd concession of the township of King—through which the proposed road was to pass—been willing to accept the same amount, \$100, as Mr. Rogers (who was the owner of the lots in 1907) had agreed to take. But that Holtby wanted \$500 for one of the proposed routes and \$1,500 for the other; and, as the road would benefit but one resident of King (Mr. Dew), the township declined to incur the expense of building the road.

The plaintiffs paid the \$100, which the defendants had by resolution agreed to accept, by crediting King with \$37.50 owing by it to East Gwillimbury, and sending a cheque for the balance, \$62.50.

The defendants were in ample funds to build the road, as intended in 1907, by having in their possession mortgages upon which the money could be raised.

There must be judgment for the defendants dismissing the action. I think the defendants are not entitled to costs. Each party will pay their own costs.

The plaintiffs appealed from the judgment of MACMAHON, J.

December 1, 1909. The appeal was heard by Moss, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.

McGregor Young, K.C., and *T. H. Lennox*, K.C., for the plaintiffs. The trend of the recent authorities is to render the defence of the absence of the corporate seal unavailable in a case like the present, where the agreement sought to be enforced is within the corporate powers of the defendants, and is an executed contract which they have adopted and of which they have received the benefit: see *Law Quarterly Review*, vol. 19, p. 251, where the learned editor, commenting on *Lawford v. Billericay Rural District Council*, [1903] 1 K.B. 772, says that a corporation cannot order and accept work and refuse to pay for it—the work being properly incident to corporate purposes—merely because there was not a

contract under seal. The plaintiffs are now asking the Court to go a step further than the mere allowance of damages for breach of the contract, but it is submitted that it is a step which logically may, and should, be taken. The following authorities were also referred to: *Township of Pembroke v. Canada Central R.W. Co.* (1882), 3 O.R. 503; *Quaintance v. Corporation of Howard* (1889), 18 O.R. 95; *Scott v. Clifton School Board* (1884), 14 Q.B.D. 500; *Bernardin v. Municipality of North Dufferin*, 19 S.C.R. 581; *Canadian Pacific R.W. Co. v. Township of Chatham*, 25 S.C.R. 608; Chitty on Contracts, 15th ed., pp. 20, 29, 316. The cases of *Waterous Engine Works Co. v. Town of Palmerston* (1892), 21 S.C.R. 556, and *Young & Co. v. Corporation of Leamington* (1883), 8 App. Cas. 517, are distinguishable. The recent case of *Bourne & Hollingsworth v. Mayor, etc., of St. Marylebone* (1908), 24 Times L.R. 322, is in favour of the plaintiffs' contention on the law, although that decision was reversed on appeal on the facts.

H. L. Drayton, K.C., and *A. B. Armstrong*, for the defendants. As a municipal corporation the defendants can only enter into a contract such as the one in question by by-law under their corporate seal, and they have entered into no such contract. The *Waterous* and *Leamington* cases are directly in point and are relied on by the defendants. The case of *Canadian Pacific R.W. Co. v. Township of Chatham* is distinguishable, as there the work was done under a former by-law. Even if the defendants should fail in this submission, still they are under no such obligation as the plaintiffs contend for, to establish which there must be shewn an absolute estoppel, or moral fraud, and it is submitted that the evidence does not shew that any such case has been made out. The defendants have received no benefit from the work done, to which, moreover, the plaintiffs were committed long before the making of the alleged agreement. The plaintiffs, on the other hand, have received great benefit from the making of the road as it stands, and the learned Judge erred in finding that this was not the case, and also in finding that any money had been paid by the plaintiffs to the defendants as a consideration for the building of the road. Even if there had been a by-law, it could have been successfully attacked: *In re Carpenter and Township of Barton* (1887), 15 O.R. 55.

Young, in reply, referred to *Melbourne Banking Corporation v. Brougham* (1879), 4 App. Cas. 156, at p. 169.

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March 24. The judgment of the Court was delivered by GARROW, J.A.:—The statement of claim alleges that on or about the 14th day of July, 1905, duly accredited representatives from the municipalities of the townships of King, West Gwillimbury, East Gwillimbury, and the village of Bradford, met and considered the advisability of opening and building a public road or highway between the village of Queensville, in the county of York, and the village of Bradford, in the county of Simcoe, running through the said townships; such representatives concurring and agreeing that the proposed highway would be to the advantage of the inhabitants of the several named municipalities, and that the necessary steps should be taken by the several municipalities to build and open the road as soon as possible; that subsequently, in or about the month of September, 1907, the defendants and the plaintiffs agreed that, in consideration of the plaintiffs opening and building such road through the plaintiffs' township to a point agreed upon in the boundary line between the plaintiffs' and defendants' townships, and agreeing to maintain the same thereafter as a public highway, the defendants would open and build and thereafter maintain a public road or highway in continuation of such first-mentioned proposed road or highway, through and within the limits of the defendants' township, from such point in the boundary line to the toll road within such limits leading to the village of Bradford; that, relying upon the said agreement, the plaintiffs built their part of the road, expending thereon large sums of money, but the defendants refused to open or build that portion of the road within the limits of the defendants' township; that the road so built by the plaintiffs is entirely useless without the continuation agreed to be constructed by the defendants; and they claimed: (1) specific performance; (2) mandamus; (3) damages.

The defendants pleaded, among other defences, a general denial of any agreement; that the so-called representatives were without authority to bind the defendants; and that, if any agreement was made, it was not authorised by any by-law, and was not made in writing, nor under the corporate seal of the defendants.

MacMahon, J., gave effect to the last-mentioned defence, and dismissed the action, but without costs.

The facts are practically not in dispute. The proposed new

highway had been, one of the witnesses said, talked of for twenty years. Its main purpose was to shorten the distance between the village of Queensville and the village of Bradford—a subsidiary purpose, no doubt, being to escape an intervening toll-gate. The main part of the road was to be in and through the plaintiffs' township. The part in the defendants' township only crossed the north-east angle of the township, and was, as proposed, about a mile along. Over a part of this distance an original side road allowance could be used, but for about half a mile the right of way would be through private property, which must have been either purchased or expropriated.

At first, as appears by the resolution passed by the defendants' council on the 24th February, 1906, the defendants' aid towards the acquirement of the new road was intended to be merely pecuniary, that resolution having authorised a grant of \$125 to assist the plaintiffs. This resolution, however, was rescinded by another resolution passed on the 28th April, 1906.

The next and last corporate act, so far as appears, on the part of the defendants, was the resolution of the 28th September, 1907, "that the offer of East Gwillimbury *re* Bradford road be accepted. . . . East Gwillimbury to pay \$100 towards the cost of building same road, provided there is not any trouble with the toll road between the Holland Landing and Bradford."

This was followed by the resolution passed by the plaintiffs' council as follows:—

"Motion passed October 11, 1907.

"That whereas Councillors Hill and Thirsk, a delegation from this council, interviewed the council of King in reference to the completion of the Queensville and Bradford road by the construction of the said road through the said township (of King); and whereas the council of King passed a resolution agreeing to complete said road, on condition that East Gwillimbury made them a grant of \$100 to aid in said construction. Therefore be and the said condition is hereby accepted, and the reeve is authorised and instructed to issue his order on the treasurer for the payment of \$62.50 to the treasurer of King, and that the payment of \$37.50 due from the township of King to the township of East Gwillimbury on account of the purchase of a certain roadway from J. A.

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Cody on lot 101, con. 1, west, be and the same is hereby cancelled. And that the corporate seal be hereto attached."

The sum mentioned, \$62.50, was subsequently paid to the defendants. The defendants were apparently under the impression that they could acquire the necessary land for the sum of \$100, and so at one time they probably could, but, owing to the land changing hands, this became impossible, the new owner demanding a much larger sum. And it was this circumstance, apparently, which put an end to the scheme so far as the defendants were concerned.

The new highway was of little or no general importance to the defendants. It is said that one man, a Mr. Dew, would thereby obtain a shorter and better outlet, but no one claims, or could claim with any show of reason, that the proposed highway was one for the general benefit of the defendants' township.

The evidence shews that the plaintiffs proceeded with the work of opening up the new road through the plaintiffs' township in the year 1906, and that, at the time the defendants' resolution of the 28th September, 1907, was passed, the chief part of the total expenditure on the part of the plaintiffs required for their part of the highway had been made.

It also appears that the new highway constructed in the plaintiffs' township, in itself and without the continuation which the defendants were to have made, shortens the distance by about two miles between Queensville and Bradford, so that the plaintiffs' expenditure has not been made in vain or thrown away.

It is not disputed that no by-law to acquire or open the new road, or to authorise an agreement to be made concerning it, was ever passed by the defendants' council; the resolutions to which I have referred covering the formal corporate action so far as appears. To overcome the legal objections of no by-law and no corporate seal, counsel for the plaintiffs contend that the contract has been fully executed by the plaintiffs, of which the defendants have had the benefit, and that, therefore, the defendants should either be compelled to a performance of their part, or made to pay damages for non-performance, on the authority of such cases as *Bernardin v. Municipality of North Dufferin*, 19 S.C.R. 581; *Canadian Pacific R.W. Co. v. Township of Chatham*, 25 S.C.R. 608; and *Lawford v. Billericay Rural District Council*, [1903] 1 K.B. 772.

Canadian Pacific R.W. Co. v. Township of Chatham has, I think, no bearing upon the question, because there was in that case an agreement under seal, and the real question was as to the authority of the council to make such an agreement in a drainage matter; *Bernardin v. Municipality of North Dufferin*, in effect, affirms what had been declared to be the law in this Province in *Pim v. County of Ontario*, 9 C.P. 304, by the then Court of Appeal, since followed in a number of cases; while *Lawford v. Billericay Rural District Council* finally resolves a long conflict in the English decisions by adopting the opinion of Wightman, J., in *Clarke v. Cuckfield Union* (1852), 21 L.J.Q.B. 349, and Blackburn, J., in *Nicholson v. Bradfield Union* (1866), L.R. 1 Q.B. 620, thus bringing the law as laid down in the English Court of Appeal practically in line with that of our own Court of Appeal and of the Supreme Court in the *Bernardin* case. And what the law upon the subject, both in England and in this Province, seems to be, is very well and with great precision summarised in the head-note to the case of *Lawford v. Billericay Rural District Council*, thus: "Where the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry those purposes into effect, and orders are given by the corporation in relation to work to be done or goods to be supplied to carry into effect those purposes, if the work done or goods supplied are accepted by the corporation and the whole consideration for payment is executed, there is a contract to pay implied from the acts of the corporation, and the absence of a contract under the seal of the corporation is no answer to an action brought in respect of the work done or the goods supplied."

The claim now made by these plaintiffs is not for work done or goods supplied to the defendants. What the plaintiffs did was to build a road in their own township, useful as far as it goes to the inhabitants of that township, but which would have been more useful if it had been continued as contemplated through the defendants' township. The remedy by mandamus could not, on the facts, be applied. Nor is the remedy by specific performance on the ground of part performance applicable. See the remarks of Strong, J., at pp. 586, 587, of the *Bernardin* case, and the authorities to which he refers. The action really is one to recover damages from the defendants for their breach of the agreement,

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said to be evidenced by their resolution of the 28th September, 1907, to construct such continuation. And, assuming everything else in the plaintiffs' favour, such as that an agreement, although not complying in form with the statute, was proved, that such agreement was in its nature within the proper competence of the defendants' council, and a performance to the extent alleged by the plaintiffs on their part, I am of the opinion that the case is clearly not one within the exception defined and laid down in these cases, and for this reason that the appeal fails.

The plaintiffs are, however, entitled to recover from the defendants the sum of \$100 which they paid or allowed in account under the resolution before set out, as upon a consideration which failed. And there should, under the circumstances, be no costs of the appeal.

[IN THE COURT OF APPEAL.]

RE CORNWALL FURNITURE CO.

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 1909
 June 28.
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 March 24.

Company—Winding-up—Contributories—Shares Allotted as Paid-up—Application of Municipal Bonus in Payment—Mistake of Law—Acceptance of Shares—Liability.

Promoters of a manufacturing company agreed with a town corporation to form the company and establish an industry in the town, and the town corporation agreed, upon certain conditions, to give a bonus of \$15,000 to the company. The company was formed, a by-law was passed authorising the issue of debentures to procure the money to pay the bonus, and the money was procured and paid over to the company. Pursuant to a resolution of the shareholders, shares called "bonus shares" were allotted as paid-up shares to the persons who were shareholders at the date of the resolution, to the amount of \$15,000, in proportion to the stock held by them at that date. Certificates of these bonus shares were issued to the respective persons named therein as the holders thereof, and they received the same with full knowledge of the circumstances. With that knowledge, they accepted the certificates, gave receipts for them, assented to their names being on the register in respect of them, received dividends, and treated and dealt with their respective shares as their property:—
Held, that they had accepted the shares and become shareholders in respect thereof; and, on the fair construction of the agreement and by-law, the \$15,000 was the property of the company, and not of the promoters, and was part of the assets of the company; the bonus shares could not be regarded as paid-up by the application of the \$15,000 in payment thereof; the persons to whom the bonus shares were allotted, although they acted under a mistaken belief, were not entitled to be relieved from the obligation to pay for the shares which they had accepted; and they were properly placed on the list of contributories in respect thereof, in the winding-up of the company.

Order of BRITTON, J., affirmed.

APPEAL by James E. Wilder and others from an order of the Local Master at Cornwall, in the course of a reference for the winding-up of the company, placing the names of the appellants upon the list of contributories. The winding-up was under the Dominion statute R.S.C. 1906, ch. 144.

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May 15, 1909. The appeal was heard by BRITTON, J., in the Weekly Court at Ottawa.

G. A. Stiles, for the appellants.

C. H. Cline, for the liquidator.

June 28, 1909. BRITTON, J.:—The learned Local Master at Cornwall, in his carefully considered judgment, sets out fully the facts. He has placed upon the list of contributories the following persons for the amounts respectively set opposite their names:—

James E. Wilder.....	\$3,000
T. S. Aspinall.....	3,150
Andrew Edwards.....	3,000
R. Larmon.....	1,800
R. A. Pringle.....	300
S. Greenwood.....	900
W. I. Wallace.....	300
B. R. Brown.....	600
P. E. Campbell.....	300
R. I. Pitts.....	600
G. W. Armstrong.....	300

These persons appeal, denying their liability, upon the grounds stated in the notice of motion, and upon other grounds.

Aspinall, Edwards, and Wilder promoted the formation of this company. They went to Cornwall and entered into negotiations with members of the town council for a bonus.

On the 15th May, 1902, they made an agreement with the town corporation, under their seals, and under the seal of the corporation, in part as follows:—

The council was to submit a by-law authorising the issue of debentures for \$16,200, of which \$15,000 would be given as a bonus to the company, if formed, and if conditions complied with, and \$1,200 was to be used by the parties named or the company for a site within the town for a furniture factory.

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The three persons named, with others to be associated with them, were to proceed with the formation of a company to be incorporated, for the manufacture of furniture and other articles. If the by-law carried, and if a company was formed and incorporated, and if that company succeeded in getting *bonâ fide* subscriptions for its stock to the amount of \$25,000, and should get stock to that amount, fully paid-up, and should have installed the necessary machinery, plant, and material, at a cost of not less than \$20,000, and should have executed an agreement and mortgage to the town corporation, securing the continuance of the work and the employment of a certain number of workmen, then this bonus would become payable.

The agreement was a very special one, apparently safeguarding the town in every particular, and providing for every contingency likely, in the natural order of things, to arise.

The by-law passed. The company was formed, but the promoters found it difficult to get other persons to subscribe and pay for stock to the amount named, so they made this agreement with any person willing to put money into the venture by subscribing and paying cash for stock, that, as soon as the \$25,000 was paid, and when the bonus was paid over to the company, they would do what they could to get the company to issue stock as paid-up stock to an amount representing the bonus, that is to say, to the amount of \$15,000, and allot that stock as paid-up stock, *pro ratâ*, to all the then existing shareholders.

As individual shareholders these men had a right to make such an agreement. No dishonesty was intended; all was open and straightforward, as it appears to me, upon the evidence. The bonus was paid over to the company on or about the 10th January, 1903, and, when, so paid, there was \$40,000 paid and in the hands of the company over and above the \$1,200 for site. The owners were the shareholders, and no others, and they owned the whole, subject to the mortgage to and the agreement with the town corporation. That mortgage, of course, had priority upon the whole buildings and plant. No one had any advantage over any other except so far as given to him by a larger personal holding of shares. There were no creditors, except the town corporation as mortgagee.

On the 8th September, 1902, the shareholders, at their first general meeting after the whole 250 shares had been subscribed and paid for, passed the following resolution:—

"Whereas the Town of Cornwall having passed a by-law granting to James E. Wilder, Telfer Somerville Aspinall, Andrew Edwards, and those associated with them, a bonus of \$15,000, payable upon terms and conditions embodied in an agreement entered into with the Corporation of the Town of Cornwall towards a furniture factory;

"And whereas the present subscribers to stock have subscribed for the several amounts set opposite their names in the stock-book of the Cornwall Furniture Company Limited, on the understanding and condition that the sum of \$15,000 should be divided as paid-up stock, in proportion to the stock held by them, that upon the said Cornwall Furniture Company Limited fulfilling their agreement with the Town of Cornwall, and receiving the said sum of \$15,000, paid-up stock shall be issued to the extent of the said sum of \$15,000 to the present shareholders, in proportion to stock held by them at this date."

Of the then total of 250 shares, 230 were represented at this meeting, and all voted for the resolution.

The learned Master has found the following:—

"That the stock certificates for the original stock subscriptions were issued in December, 1902.

"That on the 14th January, 1903, stock certificates for the bonus stock referred to in the resolution were issued.

"That in the stock-book the shares held by each shareholder of both classes of certificates are treated under the columns headed 'paid-up' as being paid-up.

"That the two classes of stock are distinguished by the word 'subscriber' being placed opposite the record of the stock subscribed for and paid for in cash, and the word 'bonus' opposite the stock received under the agreement, and that in the column headed 'paid-up' an amount is credited in each case to mark the stock in the stock-book as paid in full.

"That the company continued in business, keeping its agreement with the corporation of the town until the mortgage was reduced by about the sum of \$5,000.

"That two dividends have been paid on all of the stock.

"That nearly all of the remaining 100 shares were sold to purchasers, who paid the par value for the same.

"That the company was solvent in September, 1902, and in

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January, 1903, and that none of the present creditors of the company were creditors at the time of the issue of the bonus stock, except the Town of Cornwall, as mortgagee."

With all these findings I agree. These facts bring the case within the decision of Teetzel, J., in *Re Lake Ontario Navigation Co.*, *Davis's Case* (1909), 18 O.L.R. 354.*

I am bound by that decision, and, unless the present case can be distinguished, the appellants must remain upon the list of contributories. This case is one of great hardship on the appellants, and, as it is well settled that persons cannot be made contributories upon the mere agreement to take stock, I have considered the law and the cases bearing upon this matter.

There was not, in my opinion, a sale of shares at a discount. There was no contract by any of the appellants to purchase these shares at any price. The contract, and the only express contract, was, that they would have the company issue to them those additional shares as paid-up shares.

The resolution mentioned was one that ought not to have been acted upon by the issue of stock certificates. At most it was merely an expression of opinion of the shareholders for the directors in accordance with the facts.

Section 26 of the Ontario Companies Act (R.S.O. 1897, ch. 191) provides that, if the letters patent make no other definite provision, the shares of stock of the company, so far as they are not allotted thereby, shall be allotted when and as the directors, by by-law or otherwise, ordain.

The appeal is upon the following grounds:—

(1) That the appellants never subscribed for these shares nor were these shares ever allotted to them by the company.

(2) That the stock, if issued, was issued only as paid-up stock, and accepted only as such, so no liability attaches.

(3) That the company received adequate consideration for said stock.

(4) That, as the matter was in good faith, the company could not compel payment, and neither can the liquidator.

There was no such payment made by the appellants to the company as can be regarded as money. These men did pay

*The decision of Teetzel, J., was reversed by the Court of Appeal: (1909), 20 O.L.R. 191.

cash for shares of stock, paid in full its par value. By reason of that payment, the company was the recipient of the bonus from the town. That bonus did not belong to the individuals, and was not given to them, or paid for them, so that they would have the right to appropriate any part of it for loss of time or trouble or to indemnify them against the risk they incurred in subscribing for stock. The town bonus was the company's money—just as much so as that paid for shares—and, having it as, for the time, surplus money, the value of the shares was correspondingly enhanced.

Suppose the land purchased for a site had suddenly and unexpectedly increased in value, so that what was bought on the day of incorporation for \$1,200 could have been sold two months later, and before any new stock was offered for sale, at \$12,000, the surplus could not be taken as representing stock that could be issued and allotted to the existing shareholders.

The bonus was treated as if it was a payment, first, to the individuals who formed the company, and then by these to the company as payment for stock, or in lieu of such payment. That was unauthorised.

There was no application for stock for which the appellants intended to pay, no subscriptions for such stock; the only contract, if it can be called that, was for paid-up stock, and that was all the appellants intended to take; and, in issuing this stock, the company intended it as an issue of stock on which no calls were to be made.

This must be considered, as between the company and the shareholders, as only an attempted allotment of paid-up stock, and the allotment, or attempted allotment, can not, of itself, make the allottees liable.

The cases, however, do not require a formal subscription, or a by-law in terms allotting stock, as a *sine quâ non* to the creation of liability. This liability may arise from acceptance of the stock. If stock is accepted and is not, in fact, paid for in money, then it must be paid for in some way; and, so long as there is no fraud, so long as the transaction is not a mere sham, the adequacy of the consideration, the question of how much, will not be considered on an application to fix liability upon the shareholder in winding-up proceedings.

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If the stock is accepted, not purchased or paid for, and where, to the knowledge of the person accepting, nothing was paid, and nothing of value was given to the company, then the liability to pay is created by statute. If I am right in this, the question for consideration is practically limited to whether the appellants have accepted stock not paid for.

In the absence of any fraud or wrong-doing, and as no creditor was misled by what was done, as the stock in the books of the company was registered as paid-up stock, I would not regret being able, if possible, to relieve the appellants from a large, and perhaps to some a ruinous, liability.

In re Barangah Oil Refining Co., Arnot's Case (1887), 36 Ch. D. 702, was regarded upon the argument by the appellants as the strongest one in their favour. It is so as to the contract, but is against them in their contention that money was paid by them to the company, or that the payment of the bonus could be regarded as equivalent to cash for the shares. In that case it was held that, as the only contract was that fully paid-up shares should be given and accepted, a contract to take unpaid shares could not, in the absence of any assent to vary, be enforced by the liquidator, and that Arnot was not liable as contributory for the shares named in the agreement.

If the matter had stood with simply the agreement between these appellants themselves as individuals, and supplemented as it was by the resolution passed at the general meeting of shareholders of the company, the appellants would not have been liable. It did not so stand. The appellants accepted the certificates for this stock. They knew their names were on the stock register as shareholders in reference to these particular shares.

In Ooregum Gold Mining Co. of India v. Roper, [1892] A.C. 125 (H. of L.), it was held that a contract to issue preference shares of £1 each, with 15 shillings credited as paid, was invalid, although the contract was one to the advantage of the company, and the allottees were held liable to pay.

In re Railway Time Tables Publishing Co., Ex p. Sandys (1889), 42 Ch. D. 98, is as follows: 5,000 new shares were issued by resolution duly confirmed at 10 shillings each, the par value being £5 each. Mrs. Sandys applied for and accepted 673 shares. Afterwards she moved to have her name stricken from the register and

to get back her 10 shillings paid. Stirling, J., held that as to 523 shares she was so entitled; 150 shares had been otherwise dealt with. On appeal it was held that, although the contract under which Mrs. Sandys took the shares could not have been enforced against her, she, with knowledge that her name was on the register as the owner of these shares, dealt with them as if she had been a member of the company in respect of them, and had assented to keep them, so she was liable, under the 25th section of the Companies Act of 1867, to pay the whole amount, notwithstanding her misapprehension of the legal effect of the contract she had originally entered into.

Section 25 of the English Companies Act is the same as sec. 27 of ch. 119 of R.S.C. 1886, and is as follows: "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined. . . ."

No such section appears in ch. 191, R.S.O. 1897, nor was it re-enacted in ch. 79, R.S.C. 1906.

Section 37 of ch. 191, R.S.O. 1897: "Each shareholder, until the whole amount of his shares of stock has been paid up, shall be individually liable to the creditors of the company to an amount equal to that not paid up thereon, but shall not be liable to an action therefor by any creditor before an execution against the company has been returned unsatisfied in whole or in part. . . ."

Section 14, sub-sec. 2, of ch. 222, R.S.O. 1897 (the Ontario Winding-up Act) provides that "every shareholder or member of the company or his representative is liable to contribute the amount unpaid on his shares of the capital, or on his liability to the company or to its members or creditors, as the case may be, under the Act, charter," etc. The above cited sections, sec. 37 of ch. 191, R.S.O. 1897, and sec. 14, sub-sec. 2, of ch. 222, are re-enacted in ch. 34 of 7 Edw. VII. (O.), and sec. 172 of the last-mentioned Act is as follows: "The liability of any person to contribute to the assets of a corporation under this Act, in the event of the same being wound up, shall be deemed to create a debt accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability."

Notwithstanding the omission of sec. 27, ch. 119, R.S.C. 1886,

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from the Ontario statutes, I must hold, following the recent decision of Teetzel, J., in *Re Lake Ontario Navigation Co., Davis's Case*, 18 O.L.R. 354, that there is liability for unpaid stock if there has been an acceptance of that stock.

The *Arnot* case and other cases were distinguished by the fact present here, but wanting in the others, of assent by the shareholder to keep the shares standing in the name of such shareholder.

In the *Sandys* case, 42 Ch. D. 98, Bowen, L.J., dealing with the original contract as *one which could not have been enforced*, says (p. 117): "But the matter does not rest there, and this is just the point of the case. After her name was placed on the register and after she knew that her name was on the register, she did certain acts which were only consistent with an intention on her part to be treated as a member of the company in respect of these particular shares which had been so appropriated to her." No special agreement or promise to pay, but her name being on the register, the promise is implied, and the statute creates the liability.

In *In re Hess Manufacturing Co., Sloan's Case* (1894), 23 S.C.R. 644, it was held that shares, if paid for in money or money's worth, must be treated as paid-up shares in winding-up proceedings, and the Master has no authority to inquire into the adequacy of the consideration with a view to placing the holder on the list of contributories. A promoter can not retain secret profits, and, if such consists of paid-up shares as part of purchase price, such shares may be treated as unpaid, if held by the promoter, for which the promoter may be made a contributory.

Re Owen Sound Dry Dock Co. (1891), 21 O.R. 349, differs in that the company in which the paid-up shares were issued was afterwards incorporated by Dominion charter, treating these shares as paid-up. As there were no creditors when the new charter was granted, the company then being in a solvent condition, and as the new incorporation was not part of any scheme or plan to avoid liability, the holders of these shares were held not to be liable.

In *In re Wiarton Beet Sugar Co., Freeman's Case* (1906), 12 O.L.R. 149, the holder of bonus shares was held liable.

In *Re Pakenham Pork Packing Co.* (1906), 12 O.L.R. 100, the liability was made to depend upon acquiescence on the part of the shareholder.

In *In re Western of Canada, etc., Co., Carling's Case* (1875),

1 Ch. D. 115, the promoter entered into an agreement with a trustee for an intended company for the sale to the company of a property for a certain sum in cash and a certain number of fully paid-up shares. The agreement was not to be binding unless adopted by the company when formed. The company was formed, and the agreement was set out in the articles. The promoter applied to persons to become directors, which these persons promised to do, upon getting fully paid-up shares to qualify them. They acted as directors, and adopted the agreement of sale. After completion of the purchase, the paid-up shares were, by direction of the promoter, allotted to each, and they were placed on the register as holders, each, of 30 shares, fully paid-up. After an order for winding-up, these persons were placed on the list of contributories for 30 unpaid shares each. Held, on appeal, that the appellants stood as to these shares in the same position as if they had been allotted to the promoter and transferred by him to them, and that, as there was no contract that they would take shares independent of their accepting certificates, stating them to be the holders of the paid-up shares, they could not be placed on the list of contributories as holders of unpaid shares.

The *Carling* case was followed by *In re Innes & Co. Limited*, [1903] 2 Ch. 254 (in appeal, reversing the decision of Kekewich, J., [1903] 1 Ch. 674).

In both these cases there was a sale of property to the company as a consideration for shares, and that was the foundation and consideration of the allotment, and in these cases the liquidator could not compel payment of shares issued as paid-up, whether to vendors or their nominees.

Here there was no sale by the promoters or by any of the appellants to the company or to any trustee for the company of any property or even of goodwill.

Here there was an acceptance of the shares, to the knowledge of the appellants, not in fact paid-up; and so I must hold that they were rightly placed upon the list of contributories.

It is a case in which I should not give costs against the appellants. The liquidator's costs will be paid out of the estate.

If the appellants desire it, I grant leave to appeal.

James E. Wilder and the ten other persons named as contributories appealed from the judgment of BRITTON, J.

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January 18, 1910. The appeal was heard by Moss, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.

W. E. Middleton, K.C., and G. A. Stiles, for the appellants. The stock for which the appellants are made liable as contributories was never subscribed for by nor allotted to them. It was issued to them as paid-up stock, and no liability, therefore, attached to them. The company received adequate consideration for the stock. The company could not have enforced payment from the appellants of the amount of stock in question, and the liquidator could have no higher right, in the circumstances of the case. Any acceptance of the stock issued was an acceptance by the appellants of stock issued in the character of paid-up stock, and therefore no other contract could be enforced against them, and therefore they should not be settled upon the list of contributories: *Re Manes Tailoring Co., Crawford's Case* (1909), 18 O.L.R. 572; *In re Wiarton Beet Sugar Co., Freeman's Case*, 12 O.L.R. 149; *In re Barangah Oil Refining Co., Arnot's Case*, 36 Ch. D. 702; Lindley on Companies, 5th ed., p. 762; *In re Metropolitan Public Carriage and Repository Co., Brown's Case* (1873), L.R. 9 Ch. 102; *Re Owen Sound Dry Dock Co.*, 21 O.R. 349; *In re A. W. Hall & Co. Limited* (1887), 37 Ch. D. 712; *Burkinshaw v. Nicolls* (1878), 3 App. Cas. 1004; *Village of Brussels v. Ronald* (1885), 11 A.R. 605.

C. H. Cline, for the liquidator. The appellants when they subscribed for the stock were aware of the terms and conditions upon which the advance was being made to the company by the Town of Cornwall, and that they were purchasing a block of stock at a discount. The appellants cannot now assert that there was no subscription or allotment of the stock in question to them. The appellants voted for the resolution authorising the issue of the stock, and should have known that when directing the issue to themselves they were committing an illegal act, and that it was *ultra vires* of the company to have issued the stock to them. The appellants Wilder, Aspinall, Edwards, Larmour, Greenwood, and Pringle were directors of the company, and cannot take advantage of their own wrong in issuing the stock to themselves, and are liable, not only for the amount of the unpaid stock issued to themselves, but also for the amount of the unpaid stock issued to the other shareholders. The following authorities are relied upon. As to the liabilities: *Re Wiarton Beet Sugar Manufacturing*

Co., McNeill's Case (1905), 10 O.L.R. 219; *Re Wiarton Beet Sugar Co., Kydd's Case* (1905), 6 O.W.R. 491, 590; *In re Wiarton Beet Sugar Co., Freeman's Case*, 12 O.L.R. 149; *Tennent v. City of Glasgow Bank* (1879), 4 App. Cas. 615; *Fuches v. Hamilton Tribune Printing and Publishing Co., Copp's Case* (1885), 10 O.R. 497; *In re Richmond Hill Hotel Co., Elkington's Case* (1867), L.R. 2 Ch. 511; *In re Railway Time Tables Publishing Co., Ex p. Sandys*, 42 Ch. D. 98; *Masten's Company Law of Canada*, pp. 168, 169. As to the question of subscribing and allotment: *Re Sprouted Food Co., Hudson's Case* (1905), 6 O.W.R. 514, especially at p. 517; *Lindley on Companies*, 5th ed., p. 761; *Re Nipissing Planing Mills Limited, Rankin's Case* (1909), 13 O.W.R. 360, and especially at p. 363; *Winding-up Act*, R.S.C. 1906, ch. 144, sec. 123; also other authorities referred to in the judgment of Britton, J.

Middleton, in reply.

March 24. The judgment of the Court was delivered by Moss, C.J.O.:—The shares in question appear entered in the company's books under the distinguishing name "bonus," and have been so termed by the parties, and it will be convenient to continue to refer to them under that title.

The evidence establishes that certificates of these "bonus shares" were issued to the respective persons therein named as the holders thereof, and that they received the same with full knowledge of the circumstances. With that knowledge, they accepted and gave receipts for the certificates shewing them to be holders of the number of shares allotted to them respectively, and in this and in other ways they assented to their names being on the register in respect of them. They were paid and received dividends in respect of them; some hypothecated, others transferred, and all treated and dealt with their respective shares as their property. Under the circumstances appearing, they must be held to have accepted these shares and to have become shareholders in respect of them.

The question then is, have the shares been paid for in money or money's worth so as to discharge the holders from liability as contributories under the liquidation proceedings?

It is clear that the parties did not themselves pay for these shares. The only plausible contention put forward is that they were paid for by the application to that purpose of the sum of

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\$15,000 paid by the Town of Cornwall under the agreement between Messrs. Aspinall, Edwards, and Wilder and the town, and the by-law of the town in relation thereto, approved by vote of the ratepayers and finally passed by the council on the 19th August, 1902. But by no fair construction of the agreement and by-law can it be shewn that the \$15,000 was to be received otherwise than as the money of the company, to payment of which it was entitled, and which when paid was to form part of its assets. Whatever view the promoters may have entertained with respect to their right to receive the \$15,000 for themselves, it is plain that the by-law did not put the project before the ratepayers as one whereby the town was to contribute that sum as a personal bonus to the promoters. It is safe to say that, if it had been so presented, the by-law would not have received the ratepayers' assent. However that may be, it is sufficiently apparent on the face of the instruments that the \$15,000 was to become the property of the company. The agreement (clause 1) speaks of the amount of \$15,000 to be given to the company as a bonus, declares (clause 2) that, in the event of the ratepayers assenting to the by-law, "the parties of the first part or the company when formed" shall be entitled to the aid when and so soon as the company shall have received *bonâ fide* subscriptions for stock to the amount of \$25,000, and the same are fully paid, and the company erects buildings and does a number of other acts, and provides (clause 3) that the company shall make and execute a mortgage to the town for \$15,000 as security for due fulfilment of all the conditions contained in the agreement.

And the by-law based on the agreement refers to and deals with the sum to be raised under it as a bonus to be received by Messrs. Aspinall and Wilder as trustees for a joint stock company as aid to the company in the erection and equipment of a factory. Whether paid to or received by these gentlemen or the company, it was to be received as a bonus to the company to form part of its assets and to be applied for its purposes. There is nothing sanctioning the notion that when received it was to be applied in any form for the private or personal benefit or advantage of promoters or any other persons taking part in the formation of the company.

And when the shareholders present at their first meeting,

acting, no doubt, in good faith, assumed to treat the \$15,000 as granted to Messrs. Aspinall, Edwards, and Wilder, and those associated with them, and proceeded to devote it to purchasing paid-up shares in the company to be given to the shareholders for the first \$25,000 of shares, they were in effect assuming to make a gift to those persons of the company's money under the guise of paid-up shares in the company's capital stock without any equivalent to the company therefor. There can be no valid pretence that the shares were paid for, and that the persons to whom they were issued were entitled to hold them as fully paid-up.

It is now too late for these persons to ask to be relieved from their position as holders of the shares which they thus acquired. No doubt, they acted under a mistaken belief, but that fact does not suffice to entitle them to be relieved.

Having assented to the allocation of the shares and accepted the position of holders in respect of them, they cannot be relieved from the liability attached to the position simply because they made a mistake in the general law. There is no question that the facts were fully known to them.

However hard it may now appear, there does not seem to be any legal ground upon which it can be held that they are not liable to pay whatever sums it may be necessary in the winding-up proceedings to demand in respect of these unpaid shares.

The appeal fails and must be dismissed.

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RE DAVIES AND JAMES BAY R.W. Co.

Railway—Expropriation of Land—Dominion Railway Act—Compensation—Arbitration and Award—Value of Land Taken—Damage to Residue of Claimant's Land—Amounts not Separated in Award—Statement of Dissenting Arbitrator—Procedure on Appeal—Reduction of Amount Awarded—Interference with Working of Farm—Expense of Constructing New Road—Interest—Date of Taking Possession—Jurisdiction of Arbitrators.

Arbitrators having awarded to the claimant \$30,607 as compensation for about $4\frac{1}{2}$ acres of his stock and dairy farm of 465 acres, expropriated by the contestants for their right of way, under the Dominion Railway Act, and for damage to the residue of his land, the amount awarded was reduced on appeal to \$20,000.

The arbitrators not having stated the principles by which they were guided in coming to their conclusions, and not having separated the amount allowed for the land actually taken and the amount awarded as damages for lands injuriously affected, the course taken by the Court on the appeal was that commended by the Judicial Committee in *James Bay R.W. Co. v. Armstrong*, [1909] A.C. 624, viz., to go through all the evidence, and, having due regard to the findings of the arbitrators, so far as they could be ascertained, to examine into the justice of the award.

The award was that of two of the three arbitrators; the non-assenting arbitrator stated his views and also his understanding of the grounds on which his colleagues based their award:—

Held, that the Court could not pay regard to this statement as setting forth the grounds upon which the award was based.

The part of the farm taken for the railway was in the valley of the Don river, which traversed a part of the farm. The farm buildings were for the most part in the valley, but the arable part of the farm was largely in the uplands, and access from the buildings to the uplands was gained by means of a loop-shaped roadway, commencing at a gate entrance to the farmyard on the east side of the west or north branch of the Don, and going in a southerly direction towards the Don Mills road, there turning westerly and crossing the stream by means of a bridge, and then proceeding in a north-westerly direction to a gate at the foot of the roadway leading up a very steep hill and ascending by means of it to the uplands. The gates were kept closed or open as occasion needed for the purpose of controlling the wandering of the stock, and regulating the hauling of loads to and from the uplands. The road-bed embankment of the railway intersected both of the roadways at a height of 6 or 7 feet above their grade. The main complaint of the claimant was, that passing to and fro between the buildings and the uplands with horses, cattle, vehicles, and farm implements, involved crossing the railway twice, and opening and closing four gates, together with the delay and risk attendant thereon:—

Held, upon the evidence, that the difficulty could be overcome by the construction of a new roadway with a bridge, at an expense of \$3,000, which was an ample allowance in respect of this cause of complaint; and, while it might be true, as stated by the arbitrators, that it was not within their power to compel either the claimant or the contestants to construct the roadway and bridge, yet they were not justified in making an allowance for that particular damage greater than a sum sufficient to enable it to be obviated for all time.

The measure of the damage to which the claimant was entitled was the value of the land taken and the depreciation occasioned to the remainder by the construction and user of the railway upon the part taken; and justice to the contestants required that the award should shew on its face what amount was allowed in respect of each of these items.

The principle on which the inquiry as to the compensation when some land is taken and some injuriously affected should be proceeded with is to ascertain the value to the claimant of his property before the taking, and its value after the part has been taken, having regard to all the directions of sec. 198 of the Railway Act, and deduct the one sum from the other.

James v. Ontario and Quebec R.W. Co. (1886-8), 12 O.R. 624, 15 A.R. 1, followed.

The contestants took possession of the land on the 13th October, 1905, and the arbitrators awarded interest from that day:—

Held, that sec. 153 (2) of the Act 3 Edw. VII. ch. 58, now sec. 192 (2) of the Railway Act, was enacted for the purpose of fixing the time as of which the value and damage are to be ascertained; the question of interest is not dealt with in terms, and there is nothing in the words to interfere with the operation of the general law, which, as between vendor and purchaser, fixes the time at which interest commences as that at which the purchaser takes or may safely take possession.

When some land is taken, and other land is injuriously affected, the amounts awarded in respect of both are to be treated as purchase money.

Re Macpherson and City of Toronto (1895), 26 O.R. 558, approved.

Whether or not it was correct for the arbitrators to award the interest was not material; no substantial wrong had been done by stating it in the award.

THIS was an appeal by the railway company, the contestants, from an award of arbitrators made on the 30th March, 1908, under the Dominion Railway Act, awarding Robert Davies, the claimant, \$30,607, with interest and costs.

The arbitrators were Edward Morgan, one of the Junior Judges of the County Court of York, John T. Small, and Newman Silverthorn.

The material parts of the award were as follows:—

“Whereas the said railway company, in the exercise of its powers under the Railway Act, has expropriated and taken the lands and premises hereinafter particularly set out and described, namely: a strip of land, of varying widths, containing by admeasurement 1.492 acres, more or less, lying on each side of the located centre line of the James Bay Railway (describing it); a strip of land 100 feet in width containing by admeasurement 2.977 acres, lying 50 feet on each side of the located centre line of the James Bay Railway (describing it).

“And whereas by notice of expropriation bearing date the 2nd day of September, 1905, the said railway company gave notice to the said Robert Davies of its intention so to expropriate the said parcels of land above described.

“And whereas by an order in the High Court in the matter of such expropriation, bearing date the 13th day of October, 1905 . . . we, the undersigned arbitrators . . . were appointed the three arbitrators for determining the compensation

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to be paid to the said Robert Davies for the said lands so taken and expropriated, and the damages, if any, caused by the taking of said lands and the construction, maintenance, and operation of the said railway thereon, under and pursuant to the provisions of the Railway Act relating thereto.

“And whereas we, the said three arbitrators, have taken upon us the burden of the said reference, and have duly made and subscribed the oath of office as prescribed by the Railway Act.

“Now, therefore, know ye that we, the said arbitrators, having taken upon us the burden of the said reference and having called the parties and their witnesses before us, at all times sitting together, and having heard the evidence, documentary and *viva voce*, presented to us by the said Robert Davies and by the said railway company, and having, at the request of the parties concerned, and accompanied by their respective counsel, on two occasions viewed the land and premises in question, and having heard the arguments of counsel in reference to the matters so referred to us, and having fully heard and considered the said evidence and arguments of counsel, and the matters so referred to us, we, the said Edward Morgan and Newman Silverthorn, two of the above-named arbitrators, the other arbitrator, John T. Small, dissenting and not joining herein, but being present at execution hereof, do hereby make and publish an award of and concerning the matters so referred to us.

“Firstly, it being contended on the part of the railway company that certain damage claimed by the said Robert Davies in respect of the residue of his lands and premises other than the land, being a part thereof, taken and expropriated, could be greatly minimised by the construction of a bridge on the lands of the said Robert Davies to the west of the present railway bridge, we, the said arbitrators, always sitting together, having duly considered the question raised by such contention, are of the opinion that it is not within our powers to provide by our award or to impose upon the railway company the condition to construct and maintain the said bridge, or within our powers to make it obligatory upon the said Robert Davies to construct or maintain the said bridge, but we have fully considered the questions as to the construction of the said bridge by the said Robert Davies as a means

whereby the damage may be minimised, and we have, in making our award, fully considered and given weight to the contention of the railway company on that point.

"Having then fully considered all the matters so to us referred, we, the said Edward Morgan and Newman Silverthorn, the said John T. Small dissenting and not joining herein, do hereby find, award, and adjudge that the compensation to be paid to the said Robert Davies for the lands so taken and expropriated by the railway company and for the damage to the residue of his said lands caused by severance and otherwise as provided for in the order of reference to us, is the sum of \$30, 607, which sum is to be paid by the said railway company as and for the compensation for the said lands so expropriated and taken, and for damage to the residue of the claimant's lands so injuriously affected as aforesaid, over and above all benefit and advantage to such residue of said land by the construction of said railway, together with interest thereon at five per cent. from the 13th day of October, 1905, being the date of the order for possession.

"In respect of the lands taken and injuriously affected by the construction and maintenance of the railway through the said claimant's lands, the amount so awarded by us being in excess of the amount of compensation offered and tendered by the railway company, the costs will, in due course, as provided by the statute, follow the event."

(Signed by E. Morgan and N. Silverthorn.)

Mr. John T. Small, the dissenting arbitrator, stated in writing his reasons for dissenting, and referred therein to the opinions of the other arbitrators.

September 28, 29, and 30, and October 1, 1909. The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A.

E. D. Armour, K.C., and *R. B. Henderson*, for the appellants, the contestants. The majority arbitrators, instead of treating the question as one of difference in selling value before and after the construction of the railway, adopted the percentage evidence of the claimant, and speculated as to what percentage of the value of the farm should be allowed for different heads of damage. That method of arriving at the damages is wrong in principle; damages do not vary in proportion to the value of the farm. And

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in any case the evidence of damage by percentage was too vague to base a finding on. The award should have been based on an estimate of the market value of the farm. The true method is shewn by such cases as *James v. Ontario and Quebec R.W. Co.* (1886-8), 12 O.R. 624, 15 A.R. 1; *Metropolitan Board of Works v. McCarthy* (1874), L.R. 7 H.L. 243. There is no authority for the proposition that a man is to be paid more for a farm because it is a certain kind of farm. In *Re Canadian Northern R.W. Co. and Robinson* (1908), 8 Can. Ry. Cas. 226, 17 Man. L.R. 396, the landowner was allowed what it would cost him to buy other land in place of that taken, *plus* a sum for inconvenience in moving. *Dodge v. The King* (1906), 38 S.C.R. 149, was a somewhat similar case of a "fancy" farm, but the claim for potential value was not allowed. In *The King v. Turnbull Real Estate Co.* (1902), 8 Ex. C.R. 163, the Court looked at the assessed value of the land. The assessment here was only \$21,000, and the award is based on a value of six times that. The principle adopted is entirely wrong. If we paid the claimant his top price for his lower 15 acres and the land taken and the road outside, he would not be better off than he is under this award. He surely can't have more than that. A sum of \$10,000 would cover everything that he is entitled to. The arbitrators state that they have no jurisdiction respecting the building of a bridge, yet they considered the question of the cost of building a bridge; and the award is uncertain, because it does not shew whether the damages include the cost of the bridge. If the cost of the bridge was included, the items should have been separated. The arbitrators had no jurisdiction to award interest at all, or at least otherwise than as provided by sec. 153 (2) of the Railway Act, 1903, 3 Edw. VII. ch. 58. The cases are collected in *Re Canadian Northern R.W. Co. and Robinson*, 8 Can. Ry. Cas. 226. The principal cases in this Province are *In re Leak and City of Toronto* (1899-1900), 26 A.R. 351, 30 S.C.R. 321; *Re Macpherson and City of Toronto* (1895), 26 O.R. 558. We are governed by the Act as it now stands. In *In re Clarke and Toronto Grey and Bruce R.W. Co.* (1909), 18 O.L.R. 628, Meredith, C.J.C.P., followed the *Robinson* case, but made a distinction as to when possession given. The *Robinson* case is in favour of our contention.

C. H. Ritchie, K.C., and James Pearson, for the respondent,

the claimant. The document signed by Mr. Small is a brief for the railway company. He not only gives his own opinions, but purports to give the opinions of the other arbitrators. The principle of compensation is to give the owner what he will lose by having the land taken from him. The arbitrators may take into consideration the special purposes to which the land is or may be applied, and assess compensation in relation to the purpose which gives the highest value. The principles on which the Court should act in dealing with the award of arbitrators are laid down in *Atlantic and North-West R.W. Co. v. Wood*, [1895] A.C. 257; *Lemoine v. City of Montreal* (1894), 23 S.C.R. 390; *Re Armstrong and James Bay R.W. Co.* (1906), 12 O.L.R. 137, affirmed by the Privy Council in *James Bay R.W. Co. v. Armstrong*, [1909] A.C. 624. The question of interest was never raised until to-day. All the authorities are collected in the latest case, *In re Clarke and Toronto Grey and Bruce R.W. Co.*, 18 O.L.R. 628. The Railway Act under which the arbitration proceedings were had and the order appointing the arbitrators expressly provide that the arbitrators so appointed should determine the compensation to be paid the claimant for the lands taken by the railway company and the damages, if any, caused to the claimant by the taking of the lands so expropriated and by the construction, maintenance, and operation of the railway thereon—and this is what the award expressly states the arbitrators have done. In arriving at the amount so found the arbitrators were justified in having regard to the evidence of witnesses well skilled in the use for which the claimant purchased the lands in question, and for which he continued to use them up to the time of the expropriation by the railway company, although such witnesses could not speak definitely as to the enhanced value of these lands by reason of their proximity to the city of Toronto, but such evidence was of assistance to the arbitrators in enabling them to arrive at the amount of damages proper to be allowed the claimant under the Act and order of reference. It is for the arbitrators to fix value and estimate damages, and any evidence bearing on values and damages that will assist them in arriving at a conclusion on these matters is proper and admissible, and the arbitrators did not err in receiving and considering the evidence of witnesses who estimated damages on a basis of percentage of values. As to the value of the lands,

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the evidence of the claimant, which is uncontradicted, states that he purchased the lands in question for the purpose for which he was using them at the time of the expropriation, and that the price paid therefor and the moneys expended thereon by him in improving and preparing the lands for such use amounted to more than \$300 per acre, exclusive of the buildings erected thereon by him, and the arbitrators were justified in considering the lands worth \$300 per acre at the time of the taking, as against the evidence of the company's witnesses, none of whom could speak of the actual value of these lands for the purpose of which the claimant purchased and used them. As to the general value of those lands the claimant's evidence also shews that they are worth over \$300 per acre. With regard to the arbitrators awarding a less sum than they might have allowed had they disregarded the contention of the company that the claimant might minimise the damages in question by the erection and maintenance of a bridge on his own lands adjoining the railway, the award shews that, although the evidence on this point was vague and indefinite as to what the claimant might do in this respect, and what relief such works might afford the claimant in the way of mitigating or minimising the damages sustained by him, the arbitrators did consider and weigh said evidence, and did in the making of their award allow the company all the consideration to which they would be entitled were such evidence admissible, and it does not lie with the appellants to take objection to the award by reason of such allowance by the arbitrators. The arbitrators visited the lands several times, and familiarised themselves therewith, and were fully competent to consider and weigh the evidence adduced and to assess the damages which they have done, and the amount of the award is not more than a reasonable one and not excessive, considering the extent and value of the lands and premises affected by the expropriation of the lands taken and the use to be made thereof by the railway company.

Armour, in reply, upon the evidence, cited also *In re Cockerline and Guelph and Goderich R.W. Co.* (1906), 5 Can. Ry. Cas. 313.

March 24, 1910. Moss, C.J.O.:—The claimant is the owner of a parcel of farm lands known as Thorncliffe Farm, composed of lots or parts of lots 6, 7, 8, 9, 12, and 13 in the township of York, and containing about 465 acres. Through the enclosed portion,

and contiguous to the eastern boundary of the farm, the stream called by some witnesses the north, and by some others the west, branch of the Don river flows from the northern to the southern boundary, where it meets and joins the main stream of the Don, which traverses a portion of the southern part of lot number 6, which forms part of the farm.

In the year 1905 the contestants, in the exercise of their powers under the Railway Act, gave notice to the claimant of their intention to expropriate, for the purposes of their right of way, a portion of the southern parts of lots 6 and 7, being some of that part of Thorncliffe Farm which lies in the northern valley of the Don. The parcel proposed to be taken was 100 feet in width, and entered the claimant's property at its junction with the westerly side of the Don Mills road, a highway upon which the eastern and part of the southern side of the farm borders, and proceeded in a westerly direction for a distance of something less than 2,000 feet across the low lands in the south front of the property, the whole area taken being a little less than $4\frac{1}{2}$ acres.

This proceeding on the contestants' part eventuated in arbitration proceedings before three arbitrators, who, commencing on the 13th February, 1906, ended their task by the publication on the 30th March, 1908, of an award, in which only two of the arbitrators joined, finding the amount of compensation to be paid to the claimant for the land taken, and the damage to the residue of his lands, to be the sum of \$30,607.

During the proceedings 33 days or parts of days were occupied in hearing the testimony of some 67 witnesses, whose depositions cover 1,305 printed pages of the case.

The questions involved were the usual ones, *viz.*, the value of the land taken and the amount to be paid by the contestants as and for compensation for damages to other parts of the claimant's lands, if any, injuriously affected by reason of the exercise by the contestants of their statutory power.

It is somewhat surprising to find that comparatively simple questions like these were apparently deemed not capable of solution without such an array of witnesses and such an enormous expenditure of time over long-drawn-out examinations, cross-examinations, and re-examinations of some of them, as appears to have been deemed necessary in this instance.

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That the present system may in its workings bring about such a state of things lends additional force to the remarks of Meredith, C.J., concurred in by Lord Macnaghten, speaking for the Judicial Committee, as to the propriety of devising some means of simplifying the procedure and reducing the expense in cases of this kind: *Re Armstrong and James Bay R.W. Co.*, 12 O.L.R. 137, 142; *S.C., sub nom. James Bay R.W. Co. v. Armstrong*, [1909] A.C. 624.

In dealing upon this appeal with this mass of testimony we have before us a statement from the non-assenting arbitrator in which he sets forth, amongst other things, his understanding of the grounds on which his colleagues based their award. But the accuracy of this statement is not admitted by counsel for the claimant, and we have not the benefit of any statement from the other arbitrators. Save one passage in the award, to be presently referred to, we have nothing which we can accept as indicating the principles by which they were guided in coming to their conclusions. While we may look at so much of the statement of the non-assenting arbitrator as appears to indicate his own views, we are not at liberty to pay regard to it as setting forth the opinions of his colleagues. In this state of the case, the only course to be adopted was that commended by the Judicial Committee in *Armstrong's* case, *viz.*, to go through all the evidence, and—having, of course, due regard to the findings of the arbitrators, so far as they can be ascertained—examine into the justice of the award.

Having read, analysed, and carefully considered the whole testimony, keeping in mind the considerations that should govern, I find myself, with all due respect, unable to say that the award is just, or so free from injustice to the contestants as to render it proper and right to sustain it in its entirety.

It is very difficult to ascertain upon what principle the award is based. No separation has been made between the amount allowed for the land actually taken and the amount awarded as damages for lands injuriously affected. A lump sum is given as compensation for both.

The use to which the claimant puts the farm is as a stock and dairy farm, and it was with the purpose of putting it to such use that he acquired it. In doing this he was not actuated so much by a desire to secure a profitable investment as by the intent to

gratify a wish to indulge in the pastime of breeding and owning thoroughbred horses and high-class cattle, and upon a property brought up to the full standard of a high-class stock and dairy farm. In attaining this end he was not governed by any considerations of mere expense. He is a man of wealth, well able to indulge his fancy without counting the cost. In giving his testimony he said, in answer to a question put to him by his counsel, that it was his idea to get the place up to the highest state of cultivation and get the very highest class of thoroughbreds (p. 182 of the case). A little further on he remarked, somewhat quaintly: "It wasn't a matter of making money. If you have too much money, somebody else will get it." Then, after speaking of his outlay in placing expensive machinery upon the premises and otherwise improving it by the expenditure of large sums, and stating that altogether it had cost him nearly \$300,000, he was asked, "I suppose you don't know what you can say it was worth as a stock farm?" To which he replied, "It depends altogether on the man who owns it and how much money he has got and how much he considers his hobby." To him it possesses an attraction and value which cannot be represented by money, and which would not be attached to it on a purely commercial basis.

There seems to be no doubt that in the state to which it has been brought by generous expenditure of money, the farm does in very many respects answer all the requisites of a model stock and dairy farm. There is arable land in a high state of cultivation, capable of bearing and actually bearing excellent crops of grain, hay, and roots; there is excellent pasture; there are commodious buildings in good repair; and there is a convenient and plentiful supply of water. But, notwithstanding the large expenditure, it was not perfect, and there were, even before the entrance of the railway, drawbacks which formed serious blemishes upon the advantageous working of the farm, and since the entrance of the railway one of these especially has been made extensive use of against the contestants.

The greater part of the arable land is situate on a high plane far above the level of the Don Valley, and practically cut off from the low parts of the claimant's lands by steep hills. The main buildings, or the greater part of them, are situated in the lower parts.

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In the working of the uplands before the entrance of the railway, access from the buildings to the uplands was gained by means of a loop-shaped roadway, commencing at a gate entrance to the farmyard on the east side of the west or north branch of the Don, and going in a southerly direction towards the Don Mills road, there turning westerly and crossing the stream by means of a bridge, and then proceeding in a north-westerly direction to a gate at the foot of the roadway leading up a very steep hill and ascending by means of it to the uplands. The gates were kept closed or open as occasion needed for the purposes of controlling the wandering of the stock, and regulating the hauling of loads to and from the uplands.

In addition to this material obstacle in the practical operation of the farm, there are others caused by the large ravines through which the west or north branch of the Don and its tributaries flow. Owing to these, the land in that part is broken and rendered difficult of access. In particular there is a field of about 31 acres which is cut off and practically separated from the remaining uplands, and on the east side there is a field of about 23 acres to which there is no access from any other part of the farm, and, in order to get to it with teams, implements, or vehicles, it is necessary to go out to the Don Mills road and enter it from the highway. But, beyond doubt, the most important and serious drawback was that arising from the necessity to ascend and descend the steep hill road to and from the uplands, with loaded vehicles, farming implements, and teams. All these results of the natural formation occasioned much inconvenience, delay, and trouble in the practical operations of the farm, especially in the working of the arable portions, and tended to increase considerably the expense of carrying it on.

Nearly every witness who dealt with these aspects of the premises gave it as his opinion, some rather reluctantly, it is true, but all to the same effect, that these were substantial objections to the value of the place as a farm, whether carried on as a general or "mixed" farm, or as a stock and dairy farm. Opinions varied as to whether they could be beneficially overcome or ameliorated by the removal of the buildings to the uplands. Some were of opinion to that effect, while others maintained that the advantage of shelter afforded by the lower situation compensated for the inconveniences arising from their present position.

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Of the various heads of real or supposed effects, some substantial, and some more or less fanciful, claimed to be produced by the entrance of the railway upon the claimant's property, and tending to injure the property and depreciate its value as a whole, none was dwelt upon with the same persistency, force, and emphasis as the interruption of the traffic over the lands occasioned by the severance of the roadways to and from the uplands. A large body of witnesses, including the claimant, attributed to that the chief damage. There were, of course, as might be expected, varying opinions as to the actual value of the $4\frac{1}{2}$ acres actually taken by the contestants, as to the extent of inconvenience and risk attendant upon the necessity for crossing the railway in going to and from the highway, as to the possible effect of the passage of trains and the noise resulting therefrom upon the comfort of the cattle and thoroughbred horses while pasturing in the vicinity of the line, and as to the possible difficulty of cattle getting access to the pasture lands on the flats and watering at the streams passing there. But that which was constantly put in the foreground and upon which the chief emphasis was placed was the obstruction of the roadways. One witness went the length of characterising the north-west crossing coming down from the uplands as "the most dangerous spot I ever looked upon in any place in this world right straight there" (p. 117).

Regarding it from this point of view, this witness seemed almost to have persuaded himself that the extent of the resultant damage was so great that one could not be induced to take the farm as a gift. Many other witnesses for the claimant, while not venturing nearly so far, put the greatest percentage of damage upon the necessity of making so many crossings in the course of working the farm. This view was generally concurred in by the witnesses for the contestants. The variance was as to the extent to which the injury affected the present value to the claimant and as to means of securing the prevention of the injury for the future.

To my mind, it is clearly established by the evidence of competent engineers of undoubted standing and ability—and indeed it is not very strenuously combatted by engineers called on behalf of the claimant—that it is quite feasible, and indeed a comparatively simple matter, to construct a roadway to the west or north-west of the railway right of way which will furnish a convenient

and safe means of access to and between the buildings and the uplands, and so put an end to all necessity for crossing the railway in the working of the upland portion of the farm.

By cutting down the foot of the steep hill where it approaches the right of way on the north-west, and carrying the road parallel to the right of way with a bridge over the west or north branch of the Don, an entrance into the farmyard and premises surrounding the buildings can be secured of a better description than the present. The position of such a roadway and bridge is roughly indicated on the foregoing sketch. And the evidence shews that this end can be effected by a bridge of concrete construction, with good secure approaches, and with as easy, if not an easier, grade than the approaches to the claimant's present bridge, at a cost not exceeding, at the highest estimate, \$2,500.

Besides the evidence of engineers, there is weighty testimony of others in support of this solution, from which it might well be argued that, even if the railway were not there now, it would be good management to adopt the proposed new route. But with the railway there, the advantage of the new route is undoubted.

The testimony of Mr. W. Rennie, a practical farmer, sometime superintendent of the Agricultural College at Guelph, and a very experienced agriculturist, and of other experienced agriculturists, makes this very clear. And the evidence on this head commends itself to one's reason.

The practicability and feasibility of the construction of a roadway and bridge such as proposed by Mr. Cecil B. Smith, the well-known engineer, and the probable cost, are not disputed by Mr. Crewe, the engineer called by the claimant; though he differs on matters of detail, such as leaving trestle openings in the bridge instead of using rip rap protection for the piers. The construction of such a roadway and bridge would undoubtedly reduce to a minimum the inconvenience and risk attendant upon the need of crossing the railway in the course of operating and cultivating the uplands, and so do away with the cause of complaint on this head, of which so much has been made on behalf of the claimant.

In the face of these established facts, I am unable to understand how the arbitrators can have arrived at the amount of their award.

The land taken by the contestants comprises about $4\frac{1}{2}$ acres,

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on which stood two buildings and some thirteen or fifteen apple trees. The evidence as to the actual value of these items was, of course, conflicting, but, giving the claimant the benefit of the testimony adduced on his behalf, a liberal allowance for them would be:—

The land itself.....	\$1,100
The buildings.....	2,000
The apple trees.....	300

\$3,400

Deducting this sum from \$30,607, the amount of the award, there remains the sum of \$27,207 as damages allowed. In this, of course, would be included compensation for the double crossing of the railway in the working of the uplands as at present conducted, which, as already pointed out, was singled out and dwelt upon by the witnesses as the chief or main cause of injury or depreciation to the property.

But if due, or any reasonable, weight be given to the evidence, the removal of this cause of complaint can be readily effected at an expense of \$2,500—or, including the expense of providing a dry pathway for cattle under the railway bridge, for \$3,000. The latter sum would be an ample allowance in respect of this alleged injury.

It may be true that, as the arbitrators state in the passage of their award (p. 1309) to which reference has already been made, it was not within their power to compel either the claimant or the contestants to construct the roadway and bridge spoken of, but I cannot conceive of the arbitrators, with the evidence before them, making an allowance for that particular damage greater than a sum sufficient to enable it to be obviated for all time. In my opinion, the sum of \$3,000 would be a fair and sufficient allowance for that purpose. If it be said that this does not take into account the wear and tear, and that an allowance should be made for up-keep and maintenance, the answer is that in any case the claimant is under the necessity of providing a roadway with a bridge across the stream as he has at present, and that there is but a substitution of one route for another. But, conceding the propriety of an allowance of the kind, the sum of \$1,000 would provide \$50 a year—more than ample to cover the cost of up-

keep and maintenance. Adding, therefore, \$1,000 to the \$3,000, and thus allowing \$4,000 under these heads there would still be not less than \$23,207 coming to the claimant as compensation for injury or depreciation by reason of his remaining lands being injuriously affected by the contestants taking and using the 4½ acres in the exercise of their powers to that effect.

If the arbitrators gave no effect to the evidence as to the substituted route, and made no assessment such as, in my opinion, they could and ought to have made, then apparently a sum in the neighbourhood of \$27,207 has been awarded as compensation for damage by reason of the railway injuriously affecting the remaining property.

I am unable to discover any principle upon which such a large amount has been arrived at, and, upon a fair view of all the evidence, it appears to me to be excessive and unjust.

It would have been more satisfactory if, in making their award, the arbitrators had adopted the convenient, if not the usual, course of stating on its face the amount allowed as the value of the lands actually taken, and the amount awarded as compensation for damage to the residue of the claimant's lands.

Section 198 of the Railway Act defines the elements to be considered by the arbitrators, *viz.*, "the inconvenience, loss, or damage that might be suffered or sustained by reason of the company taking possession of or using the said lands."

The measure of damage to which the claimant is entitled is the value of the land taken and the depreciation occasioned to the remainder by the construction and user of the railway upon the part taken.

And justice to the contestants requires that the award should have shewn on its face what amount has been allowed in respect of each of these items. By so doing it would have furnished some guide for ascertaining the extent to which the arbitrators gave effect to the evidence in behalf of the claimant upon the question of damage, and some light might have been thrown on the meaning of the passage in the award (p. 1309) speaking of the construction of a bridge. It might also have afforded assistance in determining whether the arbitrators gave any weight to the evidence with regard to it. As it is now, on appeal the Court is left to work to some extent in the dark.

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The principle on which the inquiry as to the compensation when some land is taken and some injuriously affected should be proceeded with is to ascertain the value to the claimant of his property before the taking by the railway, and its value after the part has been taken, having regard, of course, to all the directions of sec. 198 of the Railway Act, and deduct the one sum from the other: *James v. Ontario and Quebec R.W. Co.*, 12 O.R. 624, 15 A.R. 1.

In leading evidence upon these points the claimant adopted a peculiar course. The claimant himself put forward his claim on the basis of having acquired the property specially for the purposes of a stock and dairy farm, and of his user and enjoyment of it as such being materially interfered with and prejudiced by the in-coming of the railway. It did not injure the productiveness of the soil, or have any effect on the crops or farm products, all of which are consumed on the premises, nothing being sent to market except a certain quantity of cream supplied each day to a city hotel. He had, and has, no intention of selling or offering the place for sale, either *en bloc* or in parcels. His object and intention is to indulge what he calls his hobby. To what extent has the value of it to him been affected by the inconvenience or damage arising from the railway having taken and occupied a part?

The only heads under which these have been arranged—apart from the inconvenience of the double crossings in the operation of the farm—are: (a) The crossing to and from the highway in order to get upon the premises. This is, of course, substantial, but no one pretends, or will pretend, that it could possibly be considered as depreciating the value beyond a very reasonable figure. (b) A possible inconvenience in getting the cattle to and from the lower pasture lands. But this is really minimised to a considerable extent by the use of the way under the railway bridge, made dry and safe as before mentioned. (c) A possible interference with the comfort of the cattle and thoroughbreds from the passage of trains and the attendant noises. But this, upon the evidence, is only conjectural, there being really no known instances recorded. (d) A suggestion that the structure of the railway bridge is likely to occasion greater overflow of the low lands at time of floods. This, again, is purely conjectural, and

the evidence seems to dispose of it as not resting upon any substantial basis.

It is, to my mind, quite out of the question to say that the existence of these real or fancied drawbacks would justify the conclusion that the claimant's property is thereby injured or depreciated in value to the extent of \$27,207.

In my opinion, a sum of \$20,000 as compensation for the value of the land and buildings and trees, and for all the inconveniences and damage by reason of the taking thereof, is an ample and sufficient, if not liberal, allowance. And I think the award should be reduced to that sum.

I may add that, if the case was now being dealt with for the first time upon the evidence, uninfluenced by the finding of the two arbitrators, I would be inclined to consider the amount I have specified as really exceeding what, upon the weight of evidence, should, in my judgment, be allowed.

A great deal of the testimony as to value and depreciation given on behalf of the claimant is far from satisfactory, and I am inclined to agree with the criticisms of the non-assenting arbitrator with reference to it.

One thing strikes me as somewhat singular about a great deal of it. Those who spoke of the capabilities and eligibility of the property as a stock and dairy farm were either unable or reluctant to give any figures at which they valued it, but were prepared to give, in a general and rather off-hand way, an opinion as to the percentage of depreciation of the whole value. They did not assume to consider the property or its value otherwise than as a stock and dairy farm. So far as they did indicate any opinion as to value, their testimony would place it at a comparatively moderate figure. Another considerable number of witnesses who testified as to value based their valuations upon the proximity of the property to the city, and the potentialities suggested by that circumstance, such as cutting the property into market gardens, building lots, etc. The evidence would seem to point pretty clearly to the conclusion that the presence of the railway where it is would scarcely affect its devotion to these purposes. For it is shewn that only the uplands could be utilised advantageously in these ways, and it seems tolerably obvious that in making use of them in these ways the only convenient

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entrance would be from the north and west. Whether the railway was there or not would, in that case, be of no consequence. Possibly the largeness of the amount awarded may be due to the percentage of the depreciation as a stock and dairy farm given by the experts on that branch having been applied to the potential values spoken of by the other classes of witnesses.

The remaining question is as to the allowance of interest upon the amount awarded. The point was not mooted until the argument of the appeal. It appears from the statement of counsel that the contestants went into possession of the land taken by them on or about the 13th October, 1905, and the arbitrators have awarded interest from that day. It was urged that the effect of sec. 153 (2) of the Act 3 Edw. VII. ch. 58, now sec. 192 (2) of the Railway Act, is to restrict the jurisdiction of the arbitrators to the allowance of interest, if any, to the date of depositing the plan, profile, and book of reference.

My view of the object of the sub-section is that it was enacted for the purpose of fixing the time as of which the value and damage are to be ascertained. The question of interest is not dealt with in terms, and there is nothing in the words to interfere with the operation of the general law, which, as between vendor and purchaser, fixes the time at which interest commences as that at which the purchaser takes or may safely take possession. The contestants having served a notice of intention to take the land, the parties thereafter stood to one another in the position of quasi vendor and purchaser. The taking of possession, whether by consent or otherwise, should, in the absence of anything further, be treated as a lawful taking by the purchaser, and, unless under special circumstances, he should be liable to pay interest on his purchase money from that date. And it has been uniformly held by the Courts of this Province that when some land is taken, and other land is injuriously affected, the amounts awarded in respect of both subjects are to be treated as purchase money: *Re Macpherson and City of Toronto*, 26 O.R. 558. The rule is different when no land is taken, and the claim is solely for compensation in respect of land injuriously affected: *In re Leak and City of Toronto*, 26 A.R. 351, 30 S.C.R. 321. The actual decision in the case cited of *Re Canadian Northern R.W. Co. and Robinson*, 17 Man. L.R. 396, so far as it dealt with the right to interest, turned upon the special facts of the case.

Whether or not it was strictly correct for the arbitrators to award the interest in terms, does not seem very material. Perhaps sec. 205 of the Railway Act might, if necessary, be invoked in the claimant's favour.

In any case, it is not the province of this Court to set aside the award on technical grounds, but to hear an appeal from it. And, as the claimant is entitled to the interest, no substantial wrong has been done by stating it in the award.

I would allow the appeal to the extent of reducing the award from \$30,607 to \$20,000, and there should be no costs of the appeal to either party.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—That the respondent's estate is injuriously affected, very grievously, by the railway, is very plain. Whether it was, or was not, practicable for the appellants to have avoided much of the injury, the effect, in a money sense, is the same. They have constructed their railway across the forefront of the property, crossing once the one way to and from the highway, and twice the one way to and from the greater part of the estate; and they have constructed it at so low a level that a passage under it is not practicable, so high that a bridge over it is impracticable; and yet not upon a level with either of such ways; so that those going to or from the highway must open, or have opened for them, two railway gates, ascend and descend about nine feet, beside crossing the track, or tracks, at a place more than ordinarily dangerous by reason of obstructions to the views up and down the railway; and, in going to and from the other parts of the estate, must, in like manner, cross the railway twice.

In these circumstances, if the appellants were desirous of doing what was fair, they would, as it seems to me, at once have taken steps with the object of closing these two ways and opening others in their stead, so as to avoid any need to cross the railway at all; but this they do not seem to have attempted, though at present it seems feasible, and indeed the most, if not the only, satisfactory way out of the difficulty, for both parties, as well as being in the public interests, which are not served by railway accidents. No doubt, in their own interests, and to serve their own purposes, the subject of substituted roads was treated in a very indifferent

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and half-hearted way by the parties, and the arbitrators seem to me to have quite failed to give it the prominence it should have had, if they at all used it as an element in ascertaining and fixing the damages. It seems to me that the respondent avoided it because it might lessen the damages, and that the appellants did likewise in the fear of increasing them.

As the award now stands, the result, arrived at as it was, I cannot but think, is largely conjectural; but, in the way in which the parties chose to leave the case, largely in generalities, with more or less remote evidential assistance, it is difficult for me to see how the arbitrators could do much beyond making a guess, in treating the case as they did; or how we—if we adopt their methods—are in any better position, or otherwise better qualified, to make a better guess; and in that case would not be prepared to interfere with their award.

But we are not driven to that one position; there is some evidence upon which the cost of such new roads as I have mentioned can be roughly estimated; and further evidence can be taken, or the matter referred back to the arbitrators for further consideration of this view of the case.

However, considering the unpardonable protraction of the arbitration—extending over more than two years, when two or three days might have sufficed—a reference back would perhaps be inexcusable, though I cannot help feeling that, if properly and promptly conducted, it might prove very useful; a feeling which, however, the other members of the Court do not share, and so a proceeding which becomes impossible.

All that is left for me, therefore, is to deal with the case upon the evidence as it stands, and that seems to me to be sufficient to support the view, which I have already expressed, that the arbitrators proceeded upon an erroneous method, that they should have based the compensation chiefly upon the cost of new roads giving access at least equal to the old roads, without crossing the railway at all; and that I am satisfied could be done for a sum well within \$10,000, and adding another \$10,000, a sufficient sum, in my opinion, for the land actually taken and for all other injury to the property, I am able to agree in the judgment of this Court reducing the amount awarded to \$20,000: see *Atlantic and North-West R.W. Co. v. Wood*, [1895] A.C. 257, and *James Bay R.W. Co. v. Armstrong*, [1909] A.C. 624.

[BOYD C.]

RE CLINTON THRESHER CO.

1910

Company—Winding-up—Contributories—Issue of Treasury Stock to Existing Shareholders as Paid-up—No Payment Made—Acceptance—Government Return—Liability.

March 30.

The directors of a company, incorporated under the Ontario Companies Act, R.S.O. 1897, ch. 191, in 1906 made a ratable distribution of treasury or company stock, to be treated as paid-up, to the extent of \$7,500, among the existing shareholders. For this nothing was given to the company by the shareholders or by any one. In the annual return to the Government made by the company in January, 1907, and in the company's books, the transaction appeared as if \$7,500 had been paid on account of stock in 1906. The names of the shareholders were placed on the register in respect of these shares, and they (or some of them) accepted the shares and allowed their names to remain on the register, and they appeared there at the time when an order was made for the winding-up of the company:—

Held, that the issue of the unissued stock belonging to the company, to the extent of \$7,500, as paid-up stock, was in violation of the statute, and *ultra vires*; all the shareholders, and not merely the directors, were affected with notice or knowledge of this; and, whatever remedy they might have had before the winding-up order, they had no right, as against the liquidators, representing creditors, to say that the shares were fully paid-up.

The names of the shareholders who had accepted the shares were, therefore, placed on the list of contributories.

Order of the Local Judge at Goderich varied.

APPEAL by certain directors and shareholders of the company from an order of the Local Judge at Goderich, upon a reference to him for the winding-up of the company under the Dominion statute, placing the names of the appellants upon the list of contributories; and an appeal by the liquidators from an order of the Local Judge refusing to place the names of other shareholders upon the list. The facts are stated in the judgment.

March 23. The appeal was heard by BOYD, C., in the Weekly Court.

W. Proudfoot, K.C., *W. M. Douglas*, K.C., and *W. Brydone*, for the shareholders, appellants and respondents.

W. J. Boland, for the liquidators.

March 30. BOYD, C.:—After the argument I desired information on some facts: (1) as to the solvency of the company at the time the paid-up shares issued; (2) as to the creditors existing at that date and still creditors; (3) the value of the assets at that time. But further consideration has led to the conclusion that these points are not material, and that the appeals may properly be disposed of on the present state of facts.

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By the terms of the Ontario statute under which this company was incorporated, it is provided that each shareholder, until the whole amount of his shares of stock has been paid-up, shall be individually liable to the creditors of the company to an amount equal to that not paid up thereon: R.S.O. 1897, ch. 191, sec. 37 (1). And by the terms of the Winding-up Act under which the liquidation is going on, it is enacted that every shareholder shall be liable to contribute the amount unpaid on his shares of the capital, or on his liability to the company, or to its creditors, etc., and the amount which he is liable to contribute shall be deemed an asset of the company: R.S.C. 1886, ch. 129, sec. 44 (R.S.C. 1906, ch. 144, sec. 51).

This is an appeal from the manner in which the list of contributories has been settled—appeal and cross-appeal from the Local Judge of Huron.

The evidence, as condensed by the Judge, shews a hard case upon the shareholders who have by their signatures accepted certificates representing them as holders of paid-up stock, which is in fact not paid-up stock. The transaction was, no doubt, engaged in by the directors under the belief that they were acting for the best, in view of the pending negotiations with the American company. They may have thought that the assets of the company were worth \$7,500 more than the \$15,000 which was the paid-up capital stock represented by the plant and property purchased from the prior partnership. Upon a dissolution of the company and the payment of creditors, there may have been a surplus of assets worth the joint sums of \$15,000 and \$7,500, but the transaction must be dealt with as it stands after the winding-up order has been made. The directors, of their own motion, made a ratable distribution of treasury or company stock, to be treated as paid-up, to the extent of \$7,500, among the existing shareholders. For this nothing was given to the company by the shareholders or by any one. It was a gift, pure and simple, of stock to be held as paid-up stock, and all parties taking it knew, or must be taken to have known, that it had not been in fact paid-up. As put by Cotton, L.J., in *In re London Celluloid Co.* (1888), 39 Ch. D. 190, 198, they, knowing the shares not to have been paid-up in cash or otherwise, agree to take the shares on that footing.

This issue of the unissued stock belonging to the company, to the extent of \$7,500, as fully paid-up stock, was in violation of the statute, and *ultra vires*. All the shareholders must be affected with notice or knowledge of this. All of them combined could not have conferred such a power, and it was done by the directors without reference to them. They shared in the distribution, and were represented to the world as so many holders of so many shares paid-up, in the annual return to the Government, made under oath in January, 1907. This was a representation, such as was also made by the books of the company, that there had been a further payment on account of stock of \$7,500 in the year 1906. Whatever might be the right of redress or remedy for any shareholder prior to the winding-up order, he has now no right against the liquidators, representing creditors, to say that these last shares he holds are fully paid-up.

The situation may be tersely described by adaptation of the language of Lord Macnaghten in *Welton v. Saffery*, [1897] A.C. 299, at p. 321. There was an offer of this so-called paid-up stock by the directors, purporting to act on behalf of the company, but it was an offer of that which the company could not give, because the law does not allow it. There was an acceptance by the accepting shareholders of that offer. But that offer and that acceptance could not constitute a contract. Both parties acted under a misconception of law, and the whole thing was void. The company, however, placed the names of the shareholders on the register; they allowed their names to remain there until their remedy against the company was gone by the issue of the winding-up order; and now they cannot be heard to say that they were not shareholders in respect of these last issued shares, upon which nothing has been paid.

The company was organised under the Joint Stock Companies Act, pursuant to a system by which the shareholder's liability is to be limited by the amount unpaid upon his shares. The company is not allowed to depart from that requirement so as to arrange with shareholders that they shall not be liable for the amount unpaid on the shares. There can be no valid stipulation that, in case the company is wound up, the shareholders are to be exempt from liability to contribute to the extent unpaid on the shares they hold, for the benefit of creditors: *Ooregum Gold Mining Co. of India v. Roper*, [1892] A.C. 125, at pp. 133 and 143.

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I cannot distinguish between the directors who did the wrong at first and the shareholders who participated in it by accepting the shares; all are alike liable to contribute, as far as necessary, upon and under the liquidation.

The only Canadian case I have seen approaching this is *Re Owen Sound Dry Dock Co.* (1891), 21 O.R. 349. It is not on all fours with this case, but, as to some of the positions advanced, I doubt whether they would now be sustained by the Court. An English case much like the present, where all the proceedings were honestly and *bonâ fide* done, yet the Court, after the winding-up order, could not give relief, is *In re Eddystone Marine Insurance Co.*, [1893] 3 Ch. 9. The shareholders there had acted on the shares for some months, and accepted dividends, but this was merely the most cogent evidence that the shares had been accepted. Here that fact is evidenced by the shareholders' signatures and the ledger or register of shares and the public announcement of the company affairs in the annual return.

The learned Judge has exculpated some of the shareholders on the authority of *In re Macdonald Sons & Co.*, [1894] 1 Ch. 89. But the distinctions are well marked between that case and the present. The applicants there received certificates relating to paid-up shares, and merely retained them. They had no reason to believe the shares referred to were not paid-up, being strangers to the company. Their names were not entered on the register, nor was there any such publication of the amount of paid-up stock held by each as is afforded by the annual return in this case; and, when the winding-up order was made, their names did not appear on the list, but were put on afterwards. More like the present case is *Re Niagara Falls Heating and Supply Co.* (1910), 15 O.W.R. 326, 1 O.W.N. 439.

I would affirm the order appealed from as to D. A. Forrester, Rance, and the representatives of Farran, with costs; but I would reverse the order as to those who signed the certificate, and are on the register, viz., Hovey, Gunn, Jackson, Taylor, with costs of cross-appeal *pro tanto*.

As to Robb and Brickenden, the Judge has not passed upon the question as to whether their signatures of acceptance were warranted to be made by the persons who acted as their attorneys (*i.e.*, Rance and Taylor). If the attorneys were authorised, their

names also should be added to the list of contributories. As to them no costs of appeal.

As to Marion McPherson, there is no evidence that she knew anything of the transaction, or has sanctioned or accepted it, and the order is affirmed as to her, with proportionate costs, to be determined by the taxing officer.

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BIGELOW v. POWERS.

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March 19

Partnership—Operation of Thresher—Injury to Property of Partner—Contract—Breach—Damages—Negligence—Right of Partner against Partnership and Co-partners—Judicature Act and Rules—Contribution.

The plaintiff, a member of a partnership or syndicate owning and operating a thresher, was *held* entitled to recover from the partnership damages awarded to him by a jury for negligence of the servant of the partnership in the operation of the thresher upon the plaintiff's premises, whereby his property was injured, and the costs of the action—there being a regulation of the partnership that a contract for threshing might be made with a member as with a stranger—with a declaration as against the individual defendants, the other members of the partnership, that, in case the judgment should not be realised out of the assets of the partnership, the deficiency should be borne by them and the plaintiff in proportion to the number of their respective shares in the partnership: Judicature Act, sec. 57; Con. Rules 222, 228, 230.

The damages were to be regarded as for breach of the defendants' contract to take due care, in doing the threshing, not to injure the grain or other property of the plaintiff.

ACTION against Powers and twenty-five other persons, members of the Pioneer Threshing Syndicate of Clarke Township, and against the syndicate as an entity, to recover damages for the burning of the plaintiff's property, in the circumstances mentioned in the judgment.

October 4, 5, and 6, 1909. The action was tried before MAGEE, J., and a jury at Cobourg.

March 19, 1910. The argument was heard at Toronto.

D. B. Simpson, K.C., and *A. J. Armstrong*, for the plaintiff.

I. F. Hellmuth, K.C., and *Eric N. Armour*, for the defendants.

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March 19. MAGEE, J.:—The plaintiff sues for damages for the burning of his barn, grain, produce, and other chattels, through sparks emitted owing to negligent management or condition of a portable engine forming part of a threshing outfit owned by the defendant syndicate, which is not incorporated, and of which the plaintiff and the twenty-six individual defendants are members, the syndicate having, through their agent, one Dowson, who was in charge of the threshing outfit, contracted with the plaintiff to thresh his grain at his barn at the ordinary rates charged by the syndicate to other persons. At the conclusion of the evidence for the plaintiff a motion was made for a nonsuit, which stood over until after the jury's findings. No evidence was offered for any of the defendants.

The jury made certain findings of fact in answer to questions submitted to them as follows:—

"1. Were the plaintiff and individual defendants, members of the syndicate, in co-partnership in the business of threshing grain under the name of the Pioneer Threshing Syndicate of Clarke Township? A. Yes.

"2. Were the barn and goods of the plaintiff burned by fire caused by sparks from the engine owned by the members of the syndicate? A. Yes.

"3. If so, did the sparks which caused such fire escape from the engine by reason of any defective condition of the engine? A. Yes.

"4. If so, did such defective condition arise after the purchase of the engine by members of the syndicate? A. Could not say.

"5. If such defective condition then existed, did Dowson, the engineer in charge, or James L. Powers or Arthur A. Powers or the plaintiff or any of the defendants, or any or all of them, and which of them, if any, have notice of the existence at that time of such defective condition? A. Yes; Dowson and Arthur Powers.

"6. If such defective condition did then exist, was its existence at that time owing to any negligence on the part of the said Dowson or the plaintiff or James L. Powers or Arthur A. Powers or any of the defendants, or any or all of them, and which of them, if any? A. Dowson.

"7. Was Dowson the agent of the members of the syndicate to make contracts with persons, including members, for the threshing of their grain with the engine and separator of the syndicate? A. Yes, subject to the rules and prices laid down by the executive.

"8. Did Dowson, assuming to act as agent for the members of the syndicate, contract with the plaintiff on their behalf for the threshing of grain of the plaintiff with the said engine and separator? A. Yes.

"9. Was Dowson then in charge of the engine with the knowledge and consent of all the members of the syndicate? If not, which of them was not consenting thereto? A. Yes.

"10. Did the defendant James L. Powers or Arthur A. Powers or directors John Bigelow, John S. Robertson, and I. T. Chapman, or any of them, assume, as between the members of the syndicate, any duty or liability of seeing to the condition of the engine beyond placing a competent man in charge of it and attending to any repairs he might report to them as necessary? A. No.

"11. If so, to what extent did they assume duty or liability as between themselves and other members of the syndicate? A. ————

"12. Could the plaintiff, by exercise of reasonable care, have avoided the loss? A. No.

"13. If so, wherein did he fail to exercise reasonable care? A. ————

"14. At what sum do you assess the plaintiff's loss by the fire? For the barn burned; for the grain burned agreed to be threshed; for other grain and other goods burned?

A. Damages to barn.....	\$2,016.00
Chattels.....	516.00
Grain to be threshed by syndicate....	441.00
Other grain.....	618.00
Hay & corn.....	295.00
	<hr/>
	\$3,886.00
Salvage.....	285.00
	<hr/>
	\$3,601.00

Both sides now move for judgment on those findings, and the defendants also on their motion for nonsuit. The plaintiff claims

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judgment upon the ground that, although he is a member of the syndicate, yet the syndicate as a body should pay his damages just as between strangers, and he should at most only bear his proportion of the loss like other members. The defendants claim judgment upon the ground that, the loss having arisen through the negligence of the common servant Dowson, or the defective condition of the common property, the plaintiff himself is equally at fault with the defendants, and cannot ask for either indemnity or contribution, and in any case he cannot be both plaintiff and in fact defendant.

During the trial it was admitted that the only assets of the syndicate or joint assets of its members were the engine and boiler, originally valued at \$1,700, and a separator, which was subject to a vendor's lien for its full price—\$800—and a waggon and tank, costing together \$88, and about \$200 of accounts owing and \$84 cash, and the earnings for 1909, about \$430, less expenses. These assets may be taken to be of less value than the plaintiff's total damages assessed by the jury.

It also appeared by the printed regulations of the syndicate that the same prices for threshing were to be charged to members as to non-members.

The jury must, I think, be taken by the 6th answer to have absolved all the individual members of the syndicate, including the plaintiff himself and Arthur Powers, from any negligence in relation to the defective condition of the engine. They do, indeed, find Arthur Powers, who was the secretary of the syndicate, to have known of the defect, but do not find that it was by his negligence that it existed at the time of the damage.

The first question that occurs to one is whether, assuming that the plaintiff were not a member of the syndicate, the loss he sustained would have been attributable to breach of contract or purely tort. Generally speaking, a mere duty cannot be turned into a contract: *Riley v. Baxendale* (1861), 6 H. & N. 445, *per* Pollock, C.B.

As regards the grain which was to be threshed, there was clearly a contract to take due care, properly to thresh it, and not to injure it.

As regards the barn and the plaintiff's other property therein, the case falls, I think, within the principle of *Brass v. Maitland*

(1856), 6 E. & B. 470, where the defendants shipped a corrosive chemical on board the plaintiffs' vessel without giving notice of its dangerous character, and in consequence other goods on board were by it destroyed. It was held that the plaintiffs' declaration stated "facts which shewed that *ex contractu* a duty was cast upon the defendants," and that "the shippers undertake that they will not deliver, to be carried in the voyage, packages of goods of a dangerous nature," etc., without notice. The mere fact that the damage is or may be caused to other property than that which is directly the subject of the contract between the parties manifestly does not make the duty to guard against it less a matter of contract: *ib.*; and see also *Randall v. Newson* (1877), 2 Q.B.D. 102, and *Jackson v. Watson*, [1909] 2 K.B. 193; Addison on Contracts, 10th ed., p. 269.

If a person contracts with another to use ordinary care or skill towards him or his property, the obligation need not be considered in the light of a duty; it is an obligation of contract: *per* Brett, M.R., in *Heaven v. Pender* (1883), 11 Q.B.D. 503.

If, then, as regards a non-member, there would have been a contract, is it less a matter of contract when the transaction is with a member, and by the regulations of the company such transactions are, by the common consent, to be entered into with members as well as others? That is, of course, aside from the question of the legal validity or the enforceability of the contract or the remedies or procedure thereunder.

I am referred by counsel for the defendants to *Neale v. Turton* (1827), 4 Bing. 149, as establishing that at law one partner could not then sue upon the acceptance of his own firm, and *De Tastet v. Shaw* (1818), 1 B. & Ald. 664, where co-partners, executors of a deceased partner, were held not entitled at law to claim under a covenant by him to pay the firm, and *Boyce v. Edbrooke*, [1903] 1 Ch. 836, where it was held that a lease under a statutory authority should, to comply with that statute, have had covenants enforceable at law as well as in equity, and the (Imperial) Partnership Act, 1890, sec. 10, making the firm liable to non-partners for wrongful acts or omissions by a partner, and *Rex v. Leech* (1821), 3 Stark. 70, as establishing that here Dowson, the servant of the syndicate, was also as such the servant of the plaintiff himself; and to (Wood's) Collyer on Partnership, 6th ed. (1878), p. 322 *et seq.* and

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notes thereto, as establishing that members of a partnership cannot sue the firm at law or in equity, nor sue each other upon matters connected with or growing out of the partnership except upon a settlement and balance struck. But these authorities do not touch the present state of the law.

On behalf of the plaintiff reference is made to Lindley on Partnership, 7th ed., pp. 413, 415, as to right to contribution, and pp. 592, 596, 598, as to right of action.

In 30 Cyc. 455, the frequency of transactions between firms and their members is thus referred to: "It is quite common for partners to buy property from the firm, or to rent or sell property to the firm, to lend it money or to borrow from it, and in many other ways to deal with it as though it were an artificial person. While such transactions are not considered as creating strictly legal obligations, between the partners on the one side and the firm on the other, courts of equity have always enforced such obligations, and, under the reformed procedure both in England and in this country, they are enforceable in appropriate actions. The law merchant adopted the civil law conception of the firm as a legal entity, and permitted the indorsement of negotiable paper, which was made by a firm to a partner or by a partner to his firm with the same effect as though the parties to the paper were strangers." And again: "While it has been stated broadly that a partnership is but a relation and is not a legal being distinct from the members who compose it, still the law does take note on a wide scale of partnership as a legal entity and regards it as a unit both of rights and obligations, and there is a general tendency at this day to complete the recognition of a partnership as a body of itself with its own means appointed to its own debts." 30 Cyc. 422.

The difficulties which formerly may have existed in the way of procedure are now, since the Judicature Act, removed, and under Con. Rules 222 and 230, any two or more persons claiming or being liable as partners may sue or be sued in the name of the firm, and this shall apply to actions between a firm and one or more of its members and to actions between firms having one or more members in common. But in such cases execution shall not issue without the leave of the Court or Judge, and on an application for leave accounts and inquiries may be ordered and directions given. There is also the provision of the Judicature Act,

sec. 57, under which a declaratory judgment may be given. And, if it were to have no greater effect than to declare that upon the taking of accounts the plaintiff would be entitled to credit for a certain sum, it would not be ineffectual.

It is clear that, if a stranger were here the plaintiff, he would be entitled to judgment against the syndicate and its members. I take it also that, if the present plaintiff as a member were compelled to pay to the stranger the whole amount of the loss, he would be entitled to be reimbursed out of the partnership funds, or to have his fellow-members contribute their share, the loss having been occasioned by no one member of the firm, but by the failure of their common servant or agent to perform their implied contract.

By judgment for this plaintiff the defendant members would be put in no worse position than if the loss had accrued to a stranger, and, inasmuch as all the members authorised a contract with each member, at the same rates as with a stranger, there is no good reason, outside of any technical rules, why they should now be in a better position and the plaintiff be put to bear all the loss which by the common act, without negligence of his own, has been inflicted on him.

There were undoubtedly difficulties formerly, even in equity, in a partner's way in obtaining his rights against his firm. In *Richardson v. Bank of England* (1838), 4 My. & Cr. 165, the Lord Chancellor, speaking of a partner who had made advances as being called a creditor of his firm, and of another partner as being a debtor of the firm, said (p. 172): "The supposed creditor has no means of compelling payment of his debt; and the supposed debtor is liable to no proceedings either at law or in equity—assuming always that no separate security has been taken or given. . . . And, pending the partnership, equity will not interfere to set right the balance between the partners." But he does not mean that eventually the partner will not have to pay the ultimate amount found due from him on taking the accounts of the firm, nor even that, if a partner admitted that a particular amount was owing, he would not be ordered to bring it into Court.

But in *Wallworth v. Holt* (1840), 4 My. & Cr. 619, in reviewing the cases as to right to grant relief without a dissolution, Lord Cottenham said (p. 635): "I think it the duty of this Court to

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adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy;" and he quotes Lord Eldon as saying, "It is better to go as far as possible towards justice than to deny it altogether;" and pointed out, with reference to the plaintiffs' bill of complaint, that "its object is to have the common assets realised and applied to their legitimate purpose, in order that the plaintiffs may be relieved from the responsibility to which they are exposed, and which is contrary to the provisions of their common contract, and to every principle of justice."

In Lindley on Partnership, 7th ed., p. 303, it is said: "Again, there appears to be no reason why an action should not now be maintained for the recovery of a debt due from one partner to the firm; nor why, if two firms have a common partner, an action should not be maintained by one firm against the other;" and to the like effect at p. 500. As already referred to, our Rules of Court expressly authorise actions of such form.

The subject would bear an elaboration which the time will not permit me to give to it, but, having in view the existence of a contract by the firm with the plaintiff, and the changes introduced by the Judicature Act and our Rules of Court, I have come to the conclusion that the plaintiff should have judgment against the defendant syndicate for the full amount of damages assessed and costs of action, and a declaration as against the other defendants that, in case the judgment be not realised out of the assets of the syndicate, the deficiency should be borne by them and the plaintiff in proportion to the number of their respective shares in the syndicate, and that he is entitled to have contribution from those defendants in respect thereof, and that in taking accounts between the parties at any time they shall be so taken that the defendants shall not be entitled to credit for and the plaintiff will not be chargeable with or loser in respect of any moneys paid or payable by the defendant syndicate or any of the defendants for costs of defence or costs paid the plaintiff in this action. Under Con. Rule 228 execution will first issue against the property of the syndicate. In case the full amount of the plaintiff's damages and costs shall not be realised thereby, there will be a reference

to the Master at Cobourg to ascertain the amounts and proportions in which the deficiency shall be borne and paid by the other defendants and the plaintiff. The costs of the reference and further directions are reserved.

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[DIVISIONAL COURT.]

OTTAWA YOUNG MEN'S CHRISTIAN ASSOCIATION v. CITY OF OTTAWA.

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Assessment and Taxes—Exemption—Building of Young Men's Christian Association—63 Vict. ch. 140 (O.)—Construction—"Purposes"—"Object"—Bed-rooms Rented to Members.

March 30.

By sec. 11 of the plaintiffs' incorporating Act, 63 Vict. ch. 140 (O.), the buildings of the plaintiffs and the land whereon the same were erected were declared to be exempt from taxation, "so long as the same are occupied by and used for the purposes of the association." The preamble stated the "object" of the association to be "the improvement of the spiritual, intellectual and social condition of young men;" and sec. 3 stated that "the object of the said corporation shall be the spiritual, mental, social and physical improvement of young men by the maintenance and support of meetings, lectures, classes, reading rooms, library, gymnasiums, and such other means as may from time to time be determined upon." By sec. 1 the plaintiffs were empowered to acquire and hold real estate in Ottawa, provided the annual value of the real estate "so held and not actually used for the work" of the association should not exceed \$10,000; and to acquire other real estate by gifts, etc., under certain conditions. The plaintiffs erected a building for their use in Ottawa, and moved into it in 1909. A part of the building, containing nearly 100 bed-rooms for the sleeping accommodation of the members of the association who chose to rent them for that purpose, was assessed by the defendants in 1909:—

Held, that the whole of the building, both before and after the plaintiffs moved in, was occupied by and used for the purposes of the association; "purposes" in sec. 11 is not synonymous with "object" in the preamble and sec. 3; the renting of the bed-rooms did not take that part of the building out of the plaintiffs' occupancy; and it might be a means for the social and physical improvement of young men to supply them with clean and well-ventilated bed-rooms.

Judgment of CLUTE, J., varied.

AN appeal by the plaintiffs and a cross-appeal by the defendants from the judgment of CLUTE, J., at the trial.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

The Ottawa Young Men's Christian Association were incorporated in 1900 by the Act 63 Vict. ch. 140 (O.). The corporation were the successors to a body of the same name previously existing, and succeeded to their property. About 1906 the corporation bought certain land in Ottawa for the purpose of erecting

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thereon a building for their use. In or about June, 1907, the association began to build and afterwards in 1908 finished the building. In June, 1909, the association moved in, having sold their old building.

The defendants did not assess the property for 1908, as it was considered exempt, but did assess for 1909 part of the building, that is, all but the ground floor, the first floor, and part of the second floor. The part assessed is occupied as bed-rooms, 97 or 98 in number, "bed-rooms for the sleeping accommodation of the members of the association who choose to rent these rooms for that purpose." These rooms produce a revenue of some \$11,000 per annum. The defendants claim the right to assess in the same way for 1910 and all subsequent years.

The action is brought for a declaration that the defendants were not entitled to impose any taxes upon the property for 1909 or 1910, and for consequent relief.

The action came on for trial before Mr. Justice Clute at Ottawa in December, 1909, and that learned Judge held that the defendants had no right to levy taxes for the year 1909, but that thereafter the defendants had the right claimed.

Both parties now appeal—the plaintiffs contending that their property is wholly exempt, the defendants that taxes were properly leviable for 1909.

March 9. The appeal and cross-appeal were heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

J. F. Orde, K.C., for the plaintiffs. The bed-rooms in the new building should be exempt from taxation. Under sec. 3 of the Act incorporating the plaintiffs, being 63 Vict. ch. 140 (O.), the object of the association is set forth as being "the spiritual, mental, social and physical improvement of young men by . . . and such other means as may . . . be determined upon." Section 11 declares that the buildings of the association and the land whereon they are erected shall, so long as the same are occupied by and used for the purposes of the association, be exempt from taxation. Now, these rooms tend to the social and physical improvement of young men, and the proceeds of these rooms are used for the purposes of the association. Therefore the main-

tenance of these bed-rooms is within the powers of the association. As to the *ejusdem generis* rule, see Maxwell's Interpretation of Statutes, 3rd ed., pp. 468, 475; *Fraser v. Pere Marquette R.W. Co.* (1908), 18 O.L.R. 589, 602. As to the meaning of the word "purposes," see Brice's *Ultra Vires*, pp. 108 and 116; *Warden and Assistants of the Harbour of Dover v. South Eastern R.W. Co.* (1852), 9 Hare 489; *People ex rel. Trustees of Mount Pleasant Academy v. Mezger* (1904), 98 N.Y. App. Div. 237.

Taylor McVeity, for the defendants. The association should be taxed for these rooms. The association cannot engage in every sort of undertaking which appertains to the spiritual, mental, social, and physical well-being of mankind, but are restricted by the word "improvement." If the plaintiffs can maintain these rooms, it might be said that they could operate a general store. The plaintiffs should be restricted, in physically improving their members, to gymnasia, sports, games, and things of that kind. Lodgings and meals are not included in "physical improvement." As to the cross-appeal, the property was rightly assessed. The trial Judge confused "possession" and "occupation." See sec. 11 63 of Vict. ch. 140 (O.); *The Queen v. St. Pancras Assessment Committee* (1877), 2 Q.B.D. 581, at p. 588. These buildings might never be used for the purposes of the association.

Orde, in reply. As to the cross-appeal, the very erection of the buildings is one of the "purposes" of the association. The association were in occupation all the time, and so the property should be exempt.

March 30. RIDDELL, J. (after stating the facts as above):—Section 11 of the incorporating Act, 63 Vict. ch. 140 (O.), reads: "11. The buildings of the Young Men's Christian Association of the City of Ottawa, and the land whereon the same are erected, shall, so long as the same are occupied by and used for the purposes of the association, be and the same are hereby declared to be exempt from taxation." The expression "purposes of the association" is employed nowhere else in the Act, and much of the argument proceeded upon the assumption that "purposes" must be synonymous with "object," as used in the preamble and in sec. 3: "Whereas an association under the name of The Ottawa Young Men's Christian Association has existed for several years

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D. C. . . . having for its object the improvement of the spiritual,
1910 intellectual and social condition of young men. . . .” “3.
OTTAWA The object of the said corporation shall be the spiritual, mental,
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v. and support of meetings, lectures, classes, reading rooms, library,
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OTTAWA. determined upon.”
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The determination of at least the cross-appeal will, in my view, depend upon the correctness of this assumption: it will be necessary then to examine into its truth.

The corporation are given, by sec. 1 of their Act, power “to acquire and hold real estate in . . . Ottawa, provided the annual value of the real estate so held and not actually used for the work of the . . . association shall not exceed at any one time \$10,000, and the same or any part thereof to alienate, exchange, mortgage, lease or otherwise charge or dispose of as occasion may require; and may also acquire any other real estate or interest therein (so long as the annual value of the same shall not at any one time exceed \$5,000), by gift, devise or bequest . . . : and may hold such estate or interest therein for a period of not more than seven years, and may within that time alienate or dispose of the same, and the proceeds of such estate or interest therein as shall have been so disposed of shall be invested in public securities for the use of the said corporation;”

The real estate which the corporation have the power to hold is of three classes:—

(1) Real estate acquired and then held and “actually used for the work” of the association. This may be to any amount and held *in infinitum*.

(2) Real estate acquired and then held, but “not actually used for the work” of the association. This is limited in amount at any one time to \$10,000 annual value; but is unlimited in point of time.

(3) “Also . . . any other real estate or interest therein” acquired “by gift, devise or bequest.” This is limited in amount to \$5,000 annual value “at any one time,” and must be disposed of in seven years, the proceeds to be invested for the use of the corporation.

It seems to me that the expression "the work of the . . . association" must mean "anything done in furtherance of the object of the association;" and consequently the corporation have power to hold real estate to a considerable extent beyond what is necessary or even convenient for the achievement of their object.

The words "object" and "purpose" are not etymologically or otherwise synonymous, and they are not terms of art. I see no reason for holding that the phrase in sec. 11 "for the purposes" means the same as "in furtherance of the object" or "for the work." There is no case that I can find which restricts the meaning of "purposes;" while such cases as *Inverarity v. County Council of Forfarshire* (1904), 41 Sc. L.R. 434, affirmed in Dom. Proc., [1906] A.C. 354, shew how far the meaning of the word may extend. *In re Sutton*, [1901] 2 Ch. 640, may also be looked at.

In the ordinary acceptation of the words, anything done for or by a corporation in the interest of the corporation is done for the purposes of the corporation; and I do not think that the meaning here is any more restricted. The corporation may occupy any of the three classes of real estate for the purposes of the corporation, and I think that the limiting provisions of sec. 11 are introduced to prevent the name of the corporation being improperly used for the purposes of individuals. The argument, of course, against this interpretation would be that all the property of the corporation would thereby be exempt, but this is not so. The buildings and land to be exempt must be, (1) occupied by the association, and (2) used for the purposes of the association. If land, for example, be leased to tenants who take the exclusive occupation, the exemption ceases—if land while ostensibly used for the purposes—advantage—of the association, is simply colourably held for some other, the exemption ceases.

If this view be correct, the cross-appeal must fail. Whether the association were to sell and dispose of the building when finished or not, the land and building also during the construction were occupied by and used for the purposes of the association.

In this same view, the appeal should be allowed. There is nothing to restrict the use by the association of the land which they acquire—and the renting of these bed-rooms does not take that part of their building out of their occupancy. The case of *The Queen v. St. Pancras Assessment Committee*, 2 Q.B.D. 581, at p. 588, decides nothing adverse to this conclusion.

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Had the conclusion been come to that "purposes" in sec. 11 is synonymous with "object" in sec. 3, it would, I think, have followed that the cross-appeal should be allowed. Granting, as must be granted, that there was nothing to prevent the Young Men's Christian Association from selling the building before actually using it for the improvement of young men, I do not think that before actual occupation and use it could be said to be "used for the object" of the association named in sec. 3.

But the same interpretation would not, in my view, have prevented the main appeal from succeeding.

In my view, it may well be a very valuable means for the social and physical improvement of young men to supply them with clean and well-ventilated bed-rooms—mental improvement will probably follow, if not spiritual improvement. There is nothing in the argument that this allows the association to come into competition with boarding and lodging house keepers—the classes, gymnasium, etc., no doubt are in competition with other enterprises. Nor does the *ejusdem generis* doctrine assist—the various classes mentioned, the species in the enumeration, are not *ejusdem generis* themselves. They are really *genera*, and the general words following, "such other means," must be understood as referring to other *genera*: *The Queen v. Payne* (1866), L.R. 1 C.C. 27; Maxwell on Statutes, 4th ed., p. 510. We have in *Fraser v. Pere Marquette R.W. Co.*, 18 O.L.R. 589, at pp. 602 *sqq.*, discussed this principle, and the cases cited there may also be referred to.

In any view of the meaning of the word "purposes," the main appeal should be allowed; and I think, for the reasons given, the cross-appeal should be dismissed—in each case with costs.

BRITTON, J.:—Both appeals depend upon the construction of sec. 11 of the plaintiffs' Act of incorporation, 63 Vict. ch. 140 (O.), which is as follows: "The buildings of the Young Men's Christian Association of the City of Ottawa, and the land whereon the same are erected, shall, so long as the same are occupied by and used for the purposes of the association, be and the same are hereby declared to be exempt from taxation." The words creating the possible difficulty and the difference of opinion are "so long as the same are occupied by and used for the purposes of the association." That is, so long as the same are occupied by the association, and used for the purposes of the association.

Within the fair meaning of the Act of incorporation, the land assessed is *occupied* by the association. The building is wholly in the possession of, and so occupied by, the association; sometimes they have empty rooms on hand, and sometimes they have these rooms temporarily used and paid for by members lodging there. The building is in actual possession of the association, in the same sense as the lessee or owner of an hotel is in possession of the hotel premises, and so the association "occupy." The synonym of "occupy" is "to be in possession of," and it would be a long way from the spirit, even from the letter, of this section, to say that the association are not in possession of the building or do not occupy it, merely because rooms are let for hire to members of the association, where the rent is used exclusively for the purposes of the association. Then I am of opinion that the use made of these rooms is well within the meaning of "use for the purposes of the association."

The object of this incorporating Act, as mentioned in the preamble, was to continue, and on a more extended scale, the work of a former association which had existed for several years in Ottawa, and which had for its object "the improvement of the spiritual, intellectual, and social condition of young men and the promotion of Christian work in that city."

The extended and enlarged work is stated in sec. 3 of the Act: "The object of the said corporation shall be the spiritual, mental, social and physical improvement of young men by the maintenance and support of meetings, lectures, classes, reading rooms, library, gymnasiums and such other means as may from time to time be determined upon." That opens a wide door. I am of opinion that furnishing sleeping-rooms for members of the association in a large building, where there are the other rooms rendered necessary for the work mentioned in sec. 3, is one of "the other means" determined upon "for the social and physical improvement of young men," and perhaps for their mental and spiritual improvement as well. But the test is not what I think about it, or what the assessor thought, but what the directors of this association, acting in good faith and within their corporate powers, may determine upon in reference to the use of their own building by their own members.

It will be seen that the intention of the Act was to make the

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association one for large work—of great advantage to young men. In addition to the land and buildings actually used for the work of the association, they are allowed, under certain restrictions, as provided by sec. 1, to hold other lands of the annual value not to exceed \$10,000, and to take and hold yet other lands by gift, devise, or bequest. There is practically no limit to the land in Ottawa that the association may hold for use for the purposes of the association, but the association must not, under cover of their charter, “engage in business of trading in real estate.” In short, the corporation must not act colourably, but must act with the intention and really to attain the object mentioned in sec. 3. It was the intention of the Act to exempt buildings so used, and, in the view I take of this case upon the evidence, renting of rooms to members in their own building fitted up for the purpose, and using the money received for such rent for the purposes of the association, do not disentitle the plaintiffs to the exemption asked.

For these reasons, with great respect, I am of opinion that the plaintiffs’ appeal should be allowed with costs and that the defendants’ cross-appeal should be dismissed with costs. All costs to the plaintiffs below.

FALCONBRIDGE, C.J.:—I agree in the result.

[DIVISIONAL COURT.]

SHARPE v. WHITE.

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March 31.

Appeal to Privy Council—Order Staying Reference Directed by Judgment—Discretion—Con. Rules 831-835—Stay of Execution—Judgment Directing Payment of Money—Con. Rule 832 (d).

An order of FALCONBRIDGE, C.J.K.B., staying proceedings on the reference directed by the judgment pending the determination of an appeal by the defendant to the Judicial Committee of the Privy Council from that judgment, was affirmed as a proper exercise of discretion.

Though Con. Rules 831 to 835, regulating the practice in this respect with regard to appeals to the Judicial Committee, differ in some respects from Con. Rules 826 to 829, as to appeals to the Court of Appeal, the language of Con. Rule 832 is substantially the same as that of R.S.O. 1877, ch. 38, sec. 37, under which *City of Toronto v. Toronto Street R.W. Co.* (1887), 12 P.R. 361, was decided; and *semble*, applying and following that case, that the proceedings upon the reference were stayed pending the appeal, by force of the words "execution shall be stayed" in Con. Rule 832.

A judgment declaring that the plaintiff is entitled to damages, directing an inquiry as to them, and reserving further directions, is not a judgment which directs the payment of money, within the meaning of clause (d) of Con. Rule 832.

An appeal by the plaintiff from an order of FALCONBRIDGE, C.J.K.B., dated the 19th November, 1909, staying proceedings on the reference directed by the judgment pending the determination of an appeal by the defendant to the Judicial Committee of the Privy Council from that judgment, and allowing an appeal from the ruling of the Official Referee to whom the reference was made, who directed that, notwithstanding the appeal, the reference should be proceeded with.

January 31. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., TEETZEL and CLUTE, JJ.

Featherston Aylesworth, for the plaintiff. The case falls under Con. Rule 832 (d),* by which execution is not to be stayed in any case where the judgment appealed from directs the payment of money, until security has been given for the payment of such sum as the appellants may be found liable for. It is also submitted that a reference is not included under the term "execution." [MEREDITH, C.J., referred to *Monro v. Toronto R.W. Co.* (1902),

* Con. Rule 832 provides that upon the perfecting of the security mentioned in Con. Rule 831 (that is, the security to be given in cases of appeal to His Majesty in Privy Council), execution shall be stayed in the original cause, except in certain specified cases, one of which (d) is where the judgment directs the payment of money.

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5 O.L.R. 15.] That case would be in point if the appeal were to the Court of Appeal under Rule 827, but has no application where the appeal is to the Privy Council. The distinction is pointed out by Maclellan, J.A., in *Centaur Cycle Co. v. Hill* (1904), 7 O.L.R. 411, at p. 412: "An appeal to the Court of Appeal is a step in the cause, or action, but a further appeal is not so." I refer to the definition of execution in Bouvier's Law Dictionary (Rawle's Revision), vol. 1, p. 715: "Execution in civil actions is the mode of obtaining the debt or damages or other thing recovered by the judgment."

R. B. Henderson, for the defendant, referred to Con. Rule 818, as shewing that FALCONBRIDGE, C.J., had power to make the order appealed from in the exercise of his discretion, apart from the provisions of the Rules: *Hargrove v. Royal Templars of Temperance* (1901), 2 O.L.R. 126. This is not a case where the payment of money is directed within the meaning of Rule 832 (d). He also referred to *Dundas v. Hamilton and Milton Road Co.* (1872), 19 Gr. 455, in which a reference was stayed under the old practice; and to *Bank of Upper Canada v. Pottroff* (1862), 8 U.C.L.J.O.S. 328. The case comes within Con. Rule 829, which applies to all cases in which execution of the judgment has become stayed. There is no suggestion that the plaintiff is in any danger of losing his money.

Aylesworth, in reply, referred to *McMaster v. Radford* (1894), 16 P.R. 20.

March 31. The judgment of the Court was delivered by MEREDITH, C.J.:—It is not open to question that, if the appeal were from the High Court to the Court of Appeal, the proceedings would be stayed pending the appeal, but it was argued by counsel for the appellant that a different rule applies where the appeal is to the Judicial Committee.

Though the Rules regulating the practice in this respect with regard to the latter class of appeals, 831 to 835, differ in some respects from those as to appeals to the Court of Appeal, 826 to 829, *City of Toronto v. Toronto Street R.W. Co.* (1887), 12 P.R. 361, is, I think, conclusive against the appellant. There the question was as to the effect of R.S.O. 1877, ch. 38, sec. 37, the language of which is substantially the same as that of Con. Rule 832, and

it was held that sec. 37 had the effect of staying an injunction which the plaintiffs had obtained, pending the appeal. Reasons for the decision do not appear in the report. It must, I think, have been based on the view that the words "execution shall be stayed" were to be read as meaning that proceedings on or for enforcing the judgment should be stayed; but, whatever the reasons may have been, we are bound to follow the decision.

The order appears to have been made by the learned Chief Justice in the exercise of his discretion; and that the Court has full power, notwithstanding the provisions of the Rules, to suspend the operation of its decree was held by the Court of Chancery in *Cotton v. Corby* (1859), 5 U.C.L.J.O.S. 67.

Though the practice in England under a Rule which confers on the Court of Appeal power to stay execution or the proceedings under the decision appealed from, pending an appeal to that Court (Order LVIII., Rule 16), is not to stay inquiries directed by a judgment pending an appeal, except under very special circumstances, a different practice has prevailed in this Province, owing possibly to the difference between our Rule and the English Rule. The English Rule provides that "an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from except so far as the Court appealed from or any Judge thereof or of the Court of Appeal may order;" while under our Rules the converse is the case, and upon perfecting the security execution is stayed save in certain enumerated cases.

We are unable to say that the discretion of the Chief Justice was wrongly exercised.

It was further contended by counsel for the appellant that the judgment appealed from is one which directs the payment of money within the meaning of clause (d) of Rule 832, and that execution was, therefore, not stayed upon the perfecting of the security, but this contention is not well-founded. By the judgment it is adjudged that the appellant is entitled to damages, an inquiry as to them is directed, and further directions are reserved, but there is no direction for the payment of money.

The appeal must, therefore, be dismissed, and the costs will be costs in the appeal.

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[MEREDITH, C.J.C.P.]

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ROSS V. TOWNSHIP OF LONDON.

April 1.

Public Health Act—Employment of Physician by Local Board of Health to Attend Smallpox Patients—Remuneration—Quantum Meruit—Remedy—Action against Members of Board—Order on Treasurer of Municipality—Secs. 57 and 93 of Act—Condition Precedent—Inability of Patients to Pay—Parties—Municipal Corporation—Motion for Mandamus.

By a resolution of the Local Board of Health of a township, the plaintiff, a medical practitioner, was in November, 1908, appointed to attend persons suffering from smallpox within the township. The resolution made no reference to the rate of remuneration. The plaintiff was present when the resolution was passed, and, being asked what his charge would be, named \$100 a week, but the Board refused to pay that sum:—

Held, on the evidence, that there was no *consensus* as to the remuneration the plaintiff was to receive; he was entitled (subject to the determination of the question of liability) to be remunerated on a *quantum meruit*; and, having regard to the fact that while attending the smallpox patients he carried on his ordinary practice, payment by the visit was the proper mode of remuneration, and \$25 would be a proper allowance for each visit.

The plaintiff sued the township corporation and the persons who in 1908 constituted the Local Board of Health of the township for \$2,300 for his services, and asked for a judgment in the nature of a mandamus or injunction requiring the individual defendants to sign, execute, and deliver an order upon the corporation or their treasurer for the amount of the plaintiff's claim:—

Held, that the plaintiff was not entitled to a personal judgment against the individual defendants; and it was to the means of payment provided by sec. 57 of the Public Health Act, R.S.O. 1897, ch. 248, that it must be taken that the contracting parties intended that the plaintiff should look for his remuneration, *i.e.*, an order of the members of the Local Board upon the treasurer of the municipality for payment "for services performed under their direction by virtue of this Act."

The only section of the Act conferring power on a Local Board to employ a physician to attend smallpox patients at the expense of the municipality is sec. 93; and under that section it is a condition precedent to the liability of the municipality that the patients should themselves be unable to pay, of which no proof was given in this case, and so the action failed.

Dictum of BURTON, J.A., in *Township of Logan v. Hurlburt* (1893), 23 A.R. 628, at p. 657, approved.

Bibby v. Davis (1902), 1 O.W.R. 189, distinguished.

Scheme of the Act considered.

In any view of the plaintiff's rights, the township corporation was not a proper party, as it was not in default.

Quære, whether the proper remedy of the plaintiff, if entitled to an order under sec. 57, was not to be obtained by a motion for a prerogative writ of mandamus.

Toronto Public Library Board v. City of Toronto (1900), 19 P.R. 329, referred to.

ACTION to recover \$2,300 for services, and for a mandatory injunction or order, as stated in the judgment.

January 15. The action was tried before MEREDITH, C.J.C.P., without a jury, at London.

J. M. McEvoy and *E. W. Scatcherd*, for the plaintiff.

E. Meredith, K.C., and *J. C. Judd*, K.C., for the defendants
the Corporation of the Township of London.

T. G. Meredith, K.C., for the other defendants.

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April 1. MEREDITH, C. J.:—The plaintiff is a medical practitioner, and was the Medical Health Officer of the Corporation of the Township of London for the years 1908 and 1909, and for some previous years, and the defendants are the Corporation of the Township of London and the persons who in the year 1908 constituted the Local Board of Health for that township.

The plaintiff's case is that in November, 1908, "a number of smallpox cases appeared" in the township of London; that he was requested by the individual defendants (the members of the Local Board of Health) to attend persons suffering from smallpox within the township; that it was agreed that he should be paid for his services at the rate of \$100 a week; that a resolution appointing him for that purpose was passed by the Board; and that he began his services on the 14th November, 1908, and continued to attend persons suffering from the disease from that day until the 24th April, 1909.

For these services the plaintiff claims \$2,300, and he asks for "a mandatory injunction or order directing the said defendants, other than the said Municipal Corporation of the Township of London, to sign, execute, and deliver an order upon the said other defendants, the said the Municipal Corporation of the Township of London, or their treasurer, for the amount of the plaintiff's claim herein," and that the defendant corporation be ordered to pay the amount of the claim.

The defendants dispute the claim of the plaintiff, and contend that in any case the charge of \$100 a week is excessive.

The resolution of the 14th November, 1908, makes no reference to the rate of remuneration, but is that the plaintiff "continue in charge of the case and make every effort to prevent the spread of the disease."

It is not open to doubt that the plaintiff, who was present when the resolution was passed, was asked what his charge would be, and that he named \$100 a week, and said, when pressed to do so by members of the Board, that he would not undertake the work for less; but it is also the fact, as I find, that up to the last moment the members of the Board refused to agree to pay \$100

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a week, and that there was no agreement on their part to do so, unless the passing of the resolution, after having been informed that the plaintiff would not undertake the work for less than \$100 a week, and the acceptance of his services, constituted such an agreement.

In my opinion, the proper finding of fact is, that there was no agreement concluded between the parties as to the remuneration the plaintiff was to receive. It was very plausibly argued that, as the plaintiff refused to give his services for less than \$100 a week, his engagement to do the work necessarily involved an assent by the Board to his terms; but it seems to me that it may be urged by the defendants with equal force that the acceptance of the employment by the plaintiff, with the knowledge that the Board would not agree to the rate of remuneration demanded by him, necessarily involved his consent to the engagement without any stipulation as to the rate of remuneration, that being left to be determined on a *quantum meruit*.

My conclusion is, that there was no *consensus* as to the remuneration the plaintiff was to receive, and that he is, therefore, not entitled as a matter of agreement to be paid at the rate of \$100 a week, but is entitled to be remunerated on a *quantum meruit*.

Nor do I think that on a *quantum meruit* the remuneration should be \$100 a week. Dr. McCallum, who was called by the plaintiff as a witness on this branch of the case, though he stated that \$100 a week for attending smallpox patients was a fair charge, qualified that statement by saying that the proper charge would depend, in part at least, upon the extent to which the physician carried on his other practice while attending the smallpox patients. Dr. Routledge, another witness, who agreed that the plaintiff's charge was a reasonable one, mentioned that his son had been paid \$100 a week, but he stated on cross-examination that his son was isolated and had to send his family away. When it is remembered that the plaintiff did not give up his practice and was not isolated, the force of the testimony of these two witnesses as to the reasonableness of the charge is much weakened.

In view of the testimony of Dr. Graham and Dr. McNeil, I am of opinion that the plaintiff is not entitled to \$100 a week, and that, having regard to the fact that while attending the smallpox patients he carried on his ordinary practice and was not iso-

lated, payment by the visit would be the proper mode of remunerating him, and that the maximum fee named by Dr. Graham, \$25, would be a proper allowance for each visit.

No evidence was given as to the number of visits, and it is, therefore, impossible for me to find the amount to which the plaintiff is entitled, and if I had been of opinion that the plaintiff was entitled to any of the relief which he claims, there must, therefore, have been a reference to ascertain it, unless the parties could agree as to the number.

The next question is, what, upon this state of facts, are the plaintiff's rights, and what is his remedy?

He is not, in my opinion, entitled to judgment against the defendants who constituted the Board of Health, personally. It was not in the contemplation of either party to the transaction that the members of the Board should incur any personal liability. The Board, although it has been held not to be a corporate body, is a public body the creation of which in every township is incumbent on its council. The reeve and clerk are *ex officio* members, and they, with three ratepayers appointed by the council, constitute the Board. The Board has no power to raise money that may be required to enable it to perform the duties with which it is charged, but is dependent upon the vote of the council for what is required for carrying on its work (the Public Health Act, R.S.O. 1897, ch. 248, sec. 56), and upon what it has power to require to be paid under the provisions of sec. 57.

That section reads as follows: "57. The treasurer of the municipality shall forthwith upon demand pay out of any moneys of the municipality in his hands the amount of any order given by the members of the local board, or any two of them, for services performed under their direction by virtue of this Act."

It is to the means of payment provided by this section, whatever it may mean, that it must be taken, I think, and to that alone, that the contracting parties intended that the plaintiff should look for his remuneration.

The only section of the Public Health Act to which I was referred or have been able to discover which confers power on a Local Board of Health to employ a physician to attend smallpox patients at the expense of the municipality is sec. 93.

That section authorises the Board of Health, in the case of

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a person such as those with whom the section deals, to provide "nurses and other assistance and necessities for him at his own cost and charge, or the cost of his parents or other person or persons liable for his support, if able to pay the same, otherwise at the cost and charge of the municipality."

Referring to the section, Burton, J.A., in *Township of Logan v. Hurlburt* (1896), 23 A.R. 628, said (p. 657): "No reference is made in the judgment to the boy's inability to pay, and I was at first of opinion that the case would fail in consequence of an omission to prove that fact, which would seem to be a condition precedent to the liability of the plaintiffs; but I find in the evidence that there is a statement to the effect that the boy had no money and his parents were under no legal obligation to pay the expenses incurred."

No evidence was given on this point, though after the close of the case I intimated to the counsel for the plaintiff that, if they desired it, I would re-open the case to enable them to shew that the condition mentioned in the section which is referred to by Burton, J.A., as a condition precedent to the liability of the municipality, existed, but they declined to avail themselves of the opportunity, and stated that they were content to rest their case on the evidence as it stood.

Even if I had not reached the same conclusion from an independent consideration of the provisions of the Act, I ought, I think, to follow the clearly expressed opinion of Burton, J.A., and hold that the plaintiff's case fails because the existence of the state of things which the learned Judge deemed to be a condition precedent to the liability of the municipality was not proved.

A consideration of the provisions of the Act has, however, led me to the same conclusion as that which was come to by Burton, J.A.

The scheme of the Act appears to me to be that, in the case of what may be termed ordinary precautions to be taken for the preservation of the public health or the prevention or spread of disease, such measures as the Local Board of Health may deem necessary are to be taken at the expense primarily of the person whose misfortune or default is the occasion for them, and that they are to be taken at the expense of the municipality only where, as is provided by such sections as secs. 82, 83, and 93, the person

primarily liable is unable to pay, or where, as in such a case as is provided for by clause 2 of sec. 69, the author of a nuisance cannot be found.

Where, however, an outbreak of smallpox or other disease dangerous to the public health takes place, the Board is clothed with large powers to enable it to cope with the outbreak, but even in such a case the cost of what is done is to be borne by the municipality only where it has not made provision for that which the Board is authorised to do: sec. 106.

So also, where a disease of a malignant or fatal character is discovered to exist in a dwelling-house or in an out-house temporarily used as a dwelling-house, and the house is situated in an unhealthy or crowded part of the municipality, or is in a filthy and neglected state, or is inhabited by too many persons, the health officers (*sic*) of the municipality or a majority of them are clothed with power to remove the inhabitants from the house and to place them in sheds, tents, or other good shelter, in a more salubrious situation, "until measures can be taken under the direction and at the expense of the municipality, for the immediate cleansing, ventilation, purification, and disinfection" of the house from which the inhabitants have been removed: sec. 78.

Sections 99 and 100 provide for other expenditures, but make no specific provision as to how they are to be defrayed.

In *Bibby v. Davis* (1902), 1 O.W.R. 189, the plaintiff, a physician who had been employed by the Local Board of Health in a similar capacity to that in which the plaintiff in this case was employed, succeeded in obtaining a mandamus directing the members of the Board to sign an order for the amount to which the plaintiff was found to be entitled; but the point upon which I decide this case was not taken, and there is nothing in the report to indicate that it was open to the defendants on the evidence.

It is unnecessary to say anything as to the right of the plaintiff to bring an action, or as to whether his proper remedy, if entitled to an order under sec. 57, was not to be obtained by a motion for a prerogative writ of mandamus, as was held by the Chancellor in *Toronto Public Library Board v. City of Toronto* (1900), 19 P.R. 329, to be the proper practice.

It appeared from the evidence that the defendant Kennedy was not a party to the agreement that was made with the plain-

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tiff, and there could, therefore, have been no recovery against him. It also appeared that he is dead.

In any view of the plaintiff's rights, the defendant the Corporation of the Township of London was improperly joined, and the action must have been dismissed as against it with costs.

The corporation was not in default, and *non constat*, if an order had been given by the Local Board for the payment of the plaintiff's claim, it would not have been paid by the treasurer.

The action is dismissed with costs.

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GREGSON V. HENDERSON ROLLER BEARING CO.

Negligence—Unsafe Premises—Injury to Servant of Lessees—Liability of Lessees as Occupiers—Lessor Entering to Do Work on Premises—Non-repair—Jury—Issue between Defendants—Pleading—Order for Trial—Necessity for.

Lessees being in occupation of a building, the lessor came in to do some work, pursuant to an undertaking in the lease, and in doing the work his men took up a movable floor or platform made and used by the lessees, and stood it on edge. One of the servants of the lessees assisted in setting it on edge, and, to make it safe, tied it with a rope. The rope got loose, and the platform fell on the plaintiff, a servant of the lessees, and injured him. In an action against both the lessees and the lessor, the jury found negligence against both defendants:—

Held, that the jury were justified in finding that the platform was not safely placed, and the lessees, as the occupiers of the property, the plaintiff being lawfully there, were obliged to have the property in a safe condition.

Held, also, that the lessees could not have any relief against their co-defendant, although claimed in pleading, there being no order for the trial of an issue between the defendants.

Cope v. Crichton (1899), 18 P.R. 462, followed.

Held, that the lessor owed no duty to the plaintiff, and was under no liability to him for non-repair, notwithstanding that he actually came upon the premises and did work; he was not to be considered as in occupation, because the work he was doing was for the benefit of the lessees, who might have waived it and excluded him if they chose; and so, notwithstanding the finding of negligence, the lessor was not liable to the plaintiff.

Malone v. Laskey, [1907] 2 K.B. 141, specially referred to.
Judgment of MAGEE, J., varied.

APPEALS by both defendants, the defendant Eckhardt and the defendant company, from the judgment of MAGEE, J., at the trial, upon the findings of a jury, in favour of the plaintiff.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

The Henderson company were the tenants of their co-defendant Eckhardt of premises on the south-east corner of Niagara

and Tecumseth streets, Toronto, under a lease by which they were to repair and to leave in repair, amongst other things being particularised water pipes, sinks, closets, etc.; the lessor forthwith to put two new closets and two wash-basins on the ground floor in connection with the offices; the lessees to have the use of the elevator; and the lessor to concrete the north half of the basement floor and to arrange a drain therefrom, the price of which was to be paid by the lessees to the lessor.

The elevator did not come quite down to the level of the floor of the lower storey, and the lessees made what is called a "platform"—really a floor—so that, the platform lying in front of the elevator, its upper surface was practically flush with the floor of the elevator. They had upon this floor a stand or rack for iron, which stood upon the other side, *i.e.*, west, of the drain about to be spoken of.

There was a drain running north and south immediately west of the elevator, which the landlord opened, it is said and not denied, as part of his undertaking in the lease. Apparently (though that upon the evidence is somewhat uncertain) the drain was closed in; at all events it was opened either for the first or second time three or four weeks before the accident which is the basis of this action. It was necessary to raise the "platform;" the defendant Eckhardt's men did raise the platform and set it upon its edge against the rack, not quite perpendicular, but at the floor being about 12 inches or so from the rack. As the platform was some 6 feet 6 inches in width, it will be seen that the angle with the vertical was less than 9° ($8^{\circ} 51'$).

An employee of the Henderson company assisted the defendant Eckhardt's men to set the platform on edge, told them it did not look safe, and went himself and got a rope ($1\frac{1}{2}$ or 2 inches or thereabouts in diameter), and tied one end of it to a post on the west side of the rack; and one of Eckhardt's employees tied the other end by a simple knot around a scantling projecting from the edge of the platform. So long as the rope held, there was no danger of the platform falling—the rope was quite strong enough; and, had it been securely tied and so remained, the platform was secure. Through some difficulty with the city inspector (apparently) the drain was allowed to remain thus open for some three weeks or more, with a plank thrown across for con-

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venience of employees passing out of the elevator upon the ground floor.

On the 18th February, 1909, the plaintiff, an employee of the Henderson company, was upon this floor to get iron from the rack, and by some means the platform fell and seriously injured him.

It was found that the end of the rope which had been tied round the scantling by Eckhardt's employees had got loose.

The action was brought against both the employers and their landlord.

At the trial before my brother Magee and a jury in January, 1910, at Toronto, the jury were asked certain questions, which questions and the answers thereto are as follows:—

“Q. 1. Was the plaintiff injured through the negligence of the defendant company and the defendant Eckhardt, or either of them, or through the negligence of any employee or employees of either of them, in the course of the employment, and, if so, through whose negligence? A. This jury agrees that the plaintiff was injured through the negligence of the employees of the defendant Eckhardt and the superintendent and foreman of the Henderson company.

“2. If so, wherein did such negligence consist? A. The defendant Eckhardt was negligent in that his employee stood the platform in the position from which it fell, and that the Henderson company were negligent in that their superintendent and foreman did not see that it was secure.

“3. When the floor section or platform which fell upon the plaintiff was placed against the rack, was it securely fastened or placed and left by the workmen who placed it there, so that it was reasonably safe in that place? A. No.

“4. Was the plaintiff injured by reason of any defect in the condition or arrangement of the ways, works, plant, buildings, or premises of the defendant company used in its business? A. Yes.

“5. If so, what was such defect? A. The platform was not placed in a safe position.

“6. If the plaintiff was injured by reason of any such defect, had the defect arisen from, or had it not been discovered or remedied owing to, the negligence of the defendant company, or of some person by them intrusted with the duty of seeing that the con-

dition or arrangement of the ways, works, plant, buildings, or premises was proper? A. The plaintiff was injured by reason of the defect not being discovered and remedied by the defendant company.

"7. If so, whose was such negligence and what position did any such negligent person occupy? A. By employees of Eckhardt and superintendent and foreman of Henderson company.

"8. Was the plaintiff injured by reason of the negligence of any person or persons in the service of the defendant company who had any superintendence intrusted to him, whilst in the exercise of such superintendence? A. Yes.

"9. If so, who was or were such negligent person or persons, and of what was or were he or they in superintendence? A. The superintendent Long and the foreman Fowler.

"10. Was the plaintiff injured by reason of the negligence of any person or persons in the service of the defendant company to whose orders or directions the plaintiff at the time of the injury was bound to conform and did conform, and did the injury result from the plaintiff having so conformed? A. Yes.

"11. If so, who was or were such negligent person or persons and wherein did such negligence consist? A. The superintendent and foreman were negligent in not seeing that the platform and rope were properly inspected from time to time.

"12. If the plaintiff was injured by reason of any defect or negligence, did he know of such defect or negligence before the injury? A. No.

"13. If the plaintiff did so know of such defect or negligence, did he fail without reasonable excuse to give or cause to be given within a reasonable time information thereof to his employer or some person superior to himself in the employer's service, and, if he did so fail, was he aware that the employer or such superior already knew of such defect or negligence? A. We do not consider that the plaintiff knew anything of such defect.

"14. Could the plaintiff, by the exercise of reasonable care, have avoided the injury? A. No.

"15. If so, wherein did he fail to exercise reasonable care? No answer.

"16. At what sum do you assess the damages of the plaintiff if he be entitled to damages? A. \$1,000.

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"17. What would be the earnings during the three years preceding the injury of a person in the same grade as the plaintiff, employed during these years in the like employment as the plaintiff, within Ontario? A. \$1,800."

The jury appended the following note to the answers: "We, the jury, do recommend that two-thirds of the damages be assessed on the defendant Eckhardt and that one-third be assessed on the defendant Henderson company, and with the cost be divided *pro ratâ*."

The learned trial Judge, upon the answers of the jury, directed judgment to be entered for the plaintiff against both defendants for \$1,000 and costs; and both defendants now appeal.

March 10 and 11. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

G. H. Watson, K.C., for the defendant Eckhardt. The defendant company were in exclusive possession of the premises at the time of the accident. There could be no negligence on the part of Eckhardt, for there was no relationship, contractual or otherwise, between the plaintiff and Eckhardt. Therefore, the latter was under no obligation or duty in respect to the former: *Malone v. Laskey*, [1907] 2 K.B. 141; *Cavalier v. Pope*, [1906] A.C. 428; *Cameron v. Young*, [1908] A.C. 176. The responsibility is on the occupier; and the defendant Eckhardt was not in possession or control of the premises at the time of the accident: *Hadley v. Taylor* (1865), L.R. 1 C.P. 53; *Woodburn Milling Co. v. Grand Trunk R.W. Co.* (1909), 19 O.L.R. 276; *Beaudry v. Rudd* (1909), 14 O.W.R. 197; *LeLievre v. Gould*, [1893] 1 Q.B. 491; *Caledonian R.W. Co. v. Mulholland*, [1898] A.C. 216; *Marshall v. Industrial Exhibition Association of Toronto* (1901), 1 O.L.R. 319; *Flynn v. Toronto Industrial Exhibition Association* (1905), 9 O.L.R. 582; *Lowery v. Walker*, [1910] 1 K.B. 173. As to the job of fixing the drain not being finished, the Henderson company had taken it over and accepted the responsibility, and so they, if any one other than the plaintiff, are guilty of negligence: *Marney v. Scott*, [1899] 1 Q.B. 986; *Brown v. Trustees of Toronto General Hospital* (1893), 23 O.R. 599.

A. H. F. Lefroy, K.C., for the defendants the Henderson Roller Bearing Co. These defendants were not guilty of any negligence.

The accident to the plaintiff was caused by his meddling with the platform. Proper measures had been employed to secure the platform. If there was any negligence other than that of the plaintiff himself, it was that of the defendant Eckhardt or his employees, as Eckhardt was in possession and control of the part of the premises where the accident occurred at the time of the accident: *Wing v. London General Omnibus Co.*, [1909] 2 K.B. 652, at p. 663.

L. F. Heyd, K.C., for the plaintiff. There was evidence on which the jury could properly find as they did. The case is one which comes under the doctrine of *res ipsa loquitur*, and the onus is upon the defendants to prove themselves blameless. This they have not done: *Briggs v. Oliver* (1866), 4 H. & C. 403; *Sangster v. T. Eaton Co.* (1894), 25 O.R. 78, 21 A.R. 624; *Roberts v. Mitchell* (1894), 21 A.R. 433.

Watson, in reply. The onus is on the plaintiff to prove negligence on the part of the defendants: *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72; *Canadian Coloured Cotton Mills Co. v. Kervin* (1899), 29 S.C.R. 478; *Montreal Rolling Mills Co. v. Corcoran* (1896), 26 S.C.R. 595.

April 5. RIDDELL, J. (after setting out the facts as above):—As to the defendants the Henderson company, I think the jury were wholly justified in finding that the platform was not safely placed—it is plain that a structure like this, some 6½ feet wide, with a slant given only by a base of some 12 inches, so that, if by any means the centre of gravity is displaced outward by more than 6 inches, it will fall, may well be found to be negligently placed. Again, the rope simply placed round a projection in a single knot may well by the jury have been considered an insufficient provision against the platform becoming displaced, and they might well find that the Henderson company's foreman and superintendent should have made better provision against accident; and this quite irrespective of the effect of the very considerable vibration of the building at that time.

Even if it should be held the duty of the landlord to place the platform in a safe position, the defendant company are not relieved of their duty in the premises.

In the much discussed, much questioned and much distinguished case, *Thomas v. Quartermaine* (1887), 18 Q.B.D. 685, Lord

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Justice Fry, at p. 703, says: "The statute was intended to place the workman in the same position as a stranger lawfully on the property by the invitation of the occupier." The defendant company were the occupiers of this property, the plaintiff was lawfully upon the property; and, whatever the duties of others may have been, it is quite clear to my mind that the company cannot get rid of the obligation to have the property in a safe condition.

Nor can the company claim any relief against their co-defendant. I do not suggest that in any case such relief could be claimed (*Malone v. Laskey*, [1907] 2 K.B. 141, at p. 154, may, however, be looked at); but, even if such relief could by any method be obtained, the company cannot obtain it in this action, there being no order to try such issue: *Cope v. Crichton* (1899), 18 P.R. 462; *Burke v. Pittman* (1888), 12 P.R. 662; *Flower v. Todd*, [1884] W.N. 47.

The fact that the claim is made in the pleadings does not advance the position of the defendant company: *Cope v. Crichton*, *ut supra*.

The liability of the defendant Eckhardt is to be determined by somewhat different considerations. The same remarks in respect of negligence will apply to his case as in the case of the company, if it be considered that he owed any duty to the plaintiff. Of course, as has been said so often, "there is no such thing as negligence in the abstract. Negligence is simply neglect of some care we are bound by law to exercise toward somebody:" *Daniels v. Noxon* (1889), 17 A.R. 206; *Thomas v. Quartermaine*, 18 Q.B.D. 685, at p. 694; *Woodburn Milling Co. v. Grand Trunk R.W. Co.*, 19 O.L.R. 276, 281; *Lowery v. Walker*, [1910] 1 K.B. 173, at pp. 180, 183.

It must be clear that, if the plaintiff had been a trespasser, he would not be entitled to recover—the last case cited is the most recent I have seen on the subject.

There can be no liability to the plaintiff upon the ground of non-repair. As early as 1794, in *Payne v. Rogers*, 2 H.Bl. 349, it was held that where the landlord had covenanted or agreed to repair, one injured by want of repair (in this case, one whose leg had slipped through a hole in the pavement owing to some plates or bars which went below the pavement being out of repair) had a right of action against the landlord. Buller, J., p. 350,

says: "I agree that the tenant as occupier is *primâ facie* bound to repair, and therefore liable, whatever private agreement there may be between him and his landlord, yet if he can shew that the landlord was to repair, then that the landlord was liable." The Lord Chief Justice (Eyre) agreed. Heath, J., said: "If we were to hold that the tenant was liable in this case, we should encourage circuity of action, as the tenant would have his remedy over against the landlord." This decision did not escape criticism, e.g., by Denman, C.J., in *Russell v. Shenton* (1842), 3 Q.B. 449, at p. 458; but certainly as late as 1877, in *Nelson v. Liverpool Brewery Co.* (1877), 2 C.P.D. 311, the doctrine that to avoid circuity of action the landlord might be sued directly receives judicial sanction. At p. 313, Lopes, J., giving the judgment of the Court, composed of Denman, J., and himself, says: "We think there are only two ways in which landlords or owners can be made liable, in the case of an injury to a stranger by the defective repair of premises let to a tenant, the occupier and the occupier alone being *primâ facie* liable: first, in the case of a contract by the landlord to do repairs, where the tenant can sue him for not repairing. . . ." But the later authorities quite negative any such liability. For example, in *Cavalier v. Pope*, [1905] 2 K.B. 757, [1906] A.C. 428, the landlord had covenanted to repair; the wife of the tenant was injured through the want of repair; and the Court of Appeal, and afterwards the House of Lords, held that the plaintiff was a stranger to the contract and had no right of action. This was followed in a Scottish case, *Cameron v. Young*, [1908] A.C. 176, "on principle common to the laws of Scotland and of England:" see p. 179.

Nor is the position of the plaintiff here advanced by the fact that the landlord actually came in and did work on the property. In *Malone v. Laskey*, [1907] 2 K.B. 141, the landlords had a water-tank upon the property repaired, but so negligently was the work done that the supporting bracket fell. In its fall it injured the plaintiff, the wife of the manager of a company which was a sub-tenant. The plaintiff failed upon a ground of nuisance, which was urged, as she had no interest in the premises or right of occupation in the proper sense of the term; while upon the ground of negligence it was considered that there was no contractual relationship between her and the defendants, the landlords, and

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the doing of the repairs was a voluntary act on the part of the defendants, not done in the discharge of a duty to the plaintiff. It is true that there was no obligation on the part of the defendants to any one to do this work, but the reasoning of the judgment is not based upon this fact. Sir Gorell Barnes, P., at p. 152, says: "The defendants . . . sent their plumbers to remedy the defect; that . . . was not done in the discharge of any duty which they owed to the plaintiff." Fletcher Moulton, L.J., p. 154, says: "In order to test the plaintiff's case, I will suppose that the defendants did the repairs for reward to them from" the tenant; and comes to the conclusion, even on that hypothesis, "that the case based on negligence fails equally with that based on nuisance:" p. 155.

Except as to one point, which will be discussed later, the present case is, in my view, almost identical with *Malone v. Laskey*. In *Malone v. Laskey* an attempt was made to make a case for the plaintiff based upon an implied representation that the work had been properly done. As in that case, so in the present, there was no attempt made to shew actual knowledge on the part of the landlord of the defect; and Sir Gorell Barnes says (p. 153), in language applicable to the present case as well: "The utmost that can be said is that what was done amounted to a representation by the defendants that the plaintiff might safely use the" property, "and, even if it did amount to such a representation, it was an innocent representation and gave the plaintiff no cause of action." Fletcher Moulton, L.J., at pp. 154, 155, vigorously contests the proposition that "in a contract there is a representation made to the whole world that the contract will be performed without negligence," and says: "If representation is a word which is properly applicable to such a case, it is confined to the other contracting party." He agrees, too, that, "even if such a representation was made . . . it was an innocent representation which gave no right of action." Kennedy, L.J., doubts, but does not dissent.

The point which differentiates the present case from those we have been considering is that here the landlord had apparently not finished his work, and that his men would need at some time to return. It might accordingly be argued that he was in occupation of that part of the premises at least so long as it might be

necessary for the purpose of finishing the job. Being so in occupation, it would be contended that he was liable under the rule in *Indermaur v. Dames* (1866-7), L.R. 1 C.P. 274, L.R. 2 C.P. 311. That the landlord was not in actual occupation is plain; and, even if the rule can be applied to any one not in actual occupation, I do not think it extends to the present case. There is no evidence that the work to be done by the landlord was made an obligation upon him by anything but the terms of the lease—no city by-law or regulation is proved or anything of that kind. This term of the lease is introduced for the benefit of the tenant, and the tenant could waive it at any time. There was then no absolute right on the part of the landlord to enter for the purpose of finishing the drain, etc. The tenant could at will exclude him, and the landlord could not legally force himself or his servants upon the premises to “fix up” the defect. He had, indeed, the right to enter and view state of repair; but that is quite a different thing. Using, *mutatis mutandis*, the language of Kennedy, L.J., in *Malone v. Laskey*, [1907] 2 K.B. at p. 156: “If the plaintiff had written a letter of complaint to the defendant Eckhardt, the Henderson company might well have refused to allow the defendant Eckhardt to come in to do the work in premises to which he had no right of entry for such purpose.” So, without going so far as to say that the occupancy to render one liable under *Indermaur v. Dames* is that power of control which renders a landlord liable under certain circumstances—and that by Lord Atkinson, in *Cavalier v. Pope*, [1906] A.C. at p. 433, is defined as implying “the power and the right to admit people to the premises and to exclude people from them”—in the present case it cannot be said that Eckhardt could be considered an occupier. It may be that Lord Atkinson’s definition should be applied here; at all events the extent of the power and right of the landlord here fall far below those stated. While the work done here by the landlord may not have been “repair,” strictly speaking, and the injury may not have been caused by non-repair, the principles must be the same in the present case as in those cited.

While I share with Lord Halsbury the regret expressed by him that the law is so, it is, of course, obligatory upon us to follow the law as we find it.

The appeal of the defendant Eckhardt should be allowed, and

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the action against him dismissed, and, as the plaintiff took his chances of a verdict against both, instead of confining his claim to the party actually liable, the costs should follow.

The appeal of the Henderson company should be dismissed with costs; that of Eckhardt allowed with costs, and the action against him dismissed with costs.

FALCONBRIDGE, C.J.K.B., and BRITTON, J., agreed in the result.

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LE SUEUR V. MORANG & CO. LIMITED.

Contract—Author and Publisher—Book Written for Specific Purpose—Refusal to Publish—Payment of Price—Offer to Return—Right to Manuscript—Tacit or Implied Term.

The defendants, the publishers of a series of biographies called "Makers of Canada," employed the plaintiff, an author, to write one of the biographies, the Life of M. The contract was made by letters and in conversations between the parties, but the plaintiff had written an earlier book in the series, in regard to which there was a formal contract. In the letters referred to there was no mention of publication, but the price was agreed on, and was paid to the plaintiff, who wrote the biography and delivered the manuscript to the defendants. They declined to publish it, on the ground that it was unsuitable for the series, whereupon the plaintiff offered to return the money paid, and demanded the manuscript, which the defendants refused to deliver:—

Held, Moss, C.J.O., dissenting, that the plaintiff was entitled to the manuscript.

Judgment of CLUTE, J., affirmed.

Per GARROW, J.A., that the written evidence must be considered in the light of the surrounding circumstances; that both parties intended when the contract was made that the proposed book should be published as one of the series, and such publication formed a material part of the consideration to the plaintiff in undertaking the work; and the inference was, that if, when the book was written, it was considered by the defendants unfitted for the series, they would return the manuscript and thus enable the plaintiff to secure publication elsewhere; they had no right, under any view of the agreement, to keep it, and also refuse to publish; or, in another view, that there was a complete rejection of the book, which the plaintiff accepted as final, whereupon the contract was at an end, and the defendants entitled to get back their money and the plaintiff his manuscript.

Per MACLAREN, J.A., that the whole contract was not in the letters, and it was impossible to find what the contract was without importing into it the facts and circumstances under which it was made; and the surrounding circumstances all pointed to the conclusion that publication of the work was an implied term of the contract.

Per MEREDITH, J.A., that the terms of the contract were to be gathered from what passed between the parties upon the subject and the surrounding material circumstances; the plaintiff was selling the offspring of his in-

telligence and education, a thing the chief value of which was in its intangible properties; he was selling it for a specific purpose, publication in the series called "Makers of Canada;" in all the circumstances, there was no reasonable doubt that there were the two corresponding and depending tacit, if not expressed, obligations: (1) that the book would be reasonably fit for the purposes for which it was written; and (2) that, if so fit, it would be published.

Per Moss, C.J.O., that there was nothing in the circumstances of this case to take it out of the ordinary rule, or to import into the agreement between the parties the element of obligation to publish, and, in case of failure to do so for any reason, to return the manuscript.

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APPEAL by the defendants from the judgment of CLUTE, J., at the trial, in favour of the plaintiff.

The following statement of the facts is taken from the judgment of GARROW, J.A.:—

The action was brought by the plaintiff, an author residing at the city of Ottawa, against the defendants, a publishing house carrying on business at the city of Toronto, to recover a manuscript life of William Lyon Mackenzie written by the plaintiff, and damages for its detention, under the following circumstances. The defendants were engaged in publishing a series of books which they called "The Makers of Canada," and applied to the plaintiff to undertake the preparation of one of the series, to be called "A Life of Frontenac." The plaintiff acceded, and a contract in writing to that effect, dated the 26th August, 1901, was thereupon executed by the parties. In pursuance of that agreement, the plaintiff prepared the manuscript of such book, and the same was, in the summer of 1905, delivered to the defendants, who accepted and published it as one of the series.

On the 4th October, 1905, Mr. Morang, the defendants' president, wrote to the plaintiff, "I note what you say about your report on Mackenzie (referring to a report by the plaintiff on the manuscript of a life of William Lyon Mackenzie intended for the series written by one H.) I will be willing to give you the \$30, but I am most anxious to publish this volume by H., and would like you to give me an estimate of the entire work of editing it, and making it acceptable if it is possible for you to do so. . . . If you undertake 'Macdonald' " (i.e., the life of Sir John A. Macdonald), "I suppose the same terms as the 'Frontenac' will be agreeable to you? . . ."

Again on the 19th October, 1905, the same gentleman wrote: "Your letter together with the summing up of your report on the

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'Mackenzie' work was duly received. You have given me just what I desired . . . I do not think P. will ever finish the book ('Macdonald') in compliance with our wishes, but if he should write . . . agreeing to do what we require, I am sure you will do as you offered here, take another book. I think the 'Mackenzie' book offers as good an opportunity for you as the 'Macdonald' . . ."

And again on the 6th December, 1905: ". . . You have given the period considerable study, and have furnished us with copious notes, which ought to make it comparatively easy for you to do the 'Mackenzie' book. I wish you would reconsider your position regarding this, and undertake the book, for which we will give you \$500 . . ." To this letter the plaintiff replied on the 7th December, 1905: "The life of W. L. Mackenzie is a ticklish bit of work . . . but, as W. has decided not to take it up, I will take it in hand on the terms you mention, and have it ready by the 1st July next, or at the latest by the 1st August."

On the 11th December, 1906, the defendants' president wrote: "In reference to your letter of the 7th in which you accept our offer to do 'William Lyon Mackenzie' for the sum of \$500, payable in instalments of \$250 as outlined, your stipulation that you will have it done by the 1st July or the 1st August is satisfactory. We accept your offer."

In addition to the correspondence there were interviews, but nothing seems to turn upon them.

Under these circumstances the plaintiff prepared the manuscript of the proposed book, and delivered it to the defendants, who, after examination, declined to publish it, upon the ground that it was unsuitable for the series, for reasons which they specified.

The plaintiff had meantime been doing other literary work for the defendants, and, under a new arrangement as to payment, had been paid the \$500; but, upon the defendants' refusal to publish, he at once offered back the \$500, and demanded a return of the manuscript, which the defendants refused.

Clute, J., found as a fact that it was, under all the circumstances, a condition of the contract that, if the plaintiff would write the book, the defendants would publish it in the series, and that, upon the defendants' refusal to publish, the plaintiff became entitled to a return of the manuscript, on refunding the \$500 which he had been paid.

November 25, 1909. The appeal was heard by Moss, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

I. F. Hellmuth, K.C., for the defendants. The contract in question was not connected with any prior contract, nor was there an obligation on the defendants' part to publish the plaintiff's work as one of the series known as "The Makers of Canada." At common law the defendants are entitled to the manuscript as a chattel, and under the Copyright Act, R.S.C. 1906, ch. 70, sec. 18, the copyright passes to the defendants, as there was no reservation to the plaintiff. The trial Judge's judgment violates the rule of evidence that when a contract has been reduced to the form of a document or series of documents, no evidence may be given of the terms of such contract except the document itself. This is not a case where extrinsic evidence is relied on for the clearing up of an ambiguity in the contract, but is an attempt to import into the contract a definite term, as to which the writing is silent. In any event, the Court had no jurisdiction to rescind the contract and order the return of the manuscript. It is not pretended that the publication of the book was made a condition precedent to the vesting of the property in the defendants, and the plaintiff's remedy, if any, was for damages for breach of contract. The defendants rely upon the following authorities: Stephen's Digest of the Law of Evidence, 6th ed., art. 90; 5 & 6 Vict. ch. 45, sec. 18 (Imp.); R.S.C. 1906, ch. 70, sec. 18; *Frowde v. Parrish* (1896), 27 O.R. 526, 23 A.R. 728; Copinger's Law of Copyright, 4th ed., p. 793, and 3rd ed., pp. 177, 178; *Grace v. Newman* (1874), L.R. 19 Eq. 623; *Sweet v. Benning* (1859), 16 C.B. 459, *per* Jervis, C.J., at p. 480; *Lamb v. Evans*, [1893] 1 Ch. 218, at p. 225; *Lawrence & Bullen Limited v. Aflalo*, [1904] A.C. 17, at p. 24; Leake's Law of Contracts, 5th ed., p. 233.

G. F. Shepley, K.C., for the plaintiff. The contract between the plaintiff and the defendants was subject to the condition, express or implied, that the defendants should publish the work in the series "The Makers of Canada." This condition was probably express, by importation into the bargain with regard to the work in question of the express provision for publication contained in the written contract between the parties under which the plaintiff wrote a previous history, "Count Frontenac," for the defendants. The property in the manuscript could only vest in the defendants subject to the performance of the conditions which together made

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up the consideration. The plaintiff, having fully performed the whole consideration on his part, was entitled, upon the refusal of the defendants to perform the whole consideration on their part, the contract being entire, and its subject-matter, the manuscript, being also entire, to rescind the contract altogether, to return so much of the consideration as he had received, and to have returned to him the manuscript, the defendants having refused to perform the condition upon which it was delivered, and subject to which the property was to pass. The remedy in damages is not the only remedy. Cases on the technical law of copyright have no application. The plaintiff relies upon *Giles v. Edwards* (1797), 7 T.R. 181; *Encyc. of the Laws of Eng.*, vol. 1, p. 644, title "Author."

Hellmuth, in reply. Publishing was only a probable incident; not part of the consideration.

April 9, 1910. GARROW, J.A. (after setting out the facts as above):—No such condition as that found by Clute, J., is expressed in the correspondence. It must, therefore, depend upon a proper consideration of the written evidence in the light of the surrounding circumstances, which may, of course, be looked at. There is no conflict of evidence. The plaintiff was the only witness examined. It is common ground that a contract of some kind was made. Neither party contended that the parties were never *ad idem*, and such a contention could scarcely have succeeded, in view of the quite explicit offer and acceptance disclosed in the correspondence to which I have referred. And, if there was in fact a completed contract, a mere dispute as to the meaning of some of its terms would not make it any the less an agreement; the dispute would be considered and adjusted by the Court as a matter of construction: See *Baines v. Woodfall* (1859), 6 C.B.N.S. 657.

The circumstances under which the law sometimes, in furtherance of the intention, implies a term not expressed, have been frequently considered: see *per* Bowen, L.J., in *The Moorcock* (1889), 14 P.D. 64; *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488 (C.A.); *Ogdens Limited v. Nelson*, [1903] 2 K.B. 287, [1904] 2 K.B. 410, and [1905] A.C. 109.

In *Hamlyn & Co. v. Wood & Co.*, Lord Esher, M.R., states the rule to be, "that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract

in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned:" p. 491.

In the *Moorcock* case the rule and its presumed foundation are somewhat fully discussed by Bowen, L.J., who states it as his conclusion from all the cases upon the subject that the law raises "an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have." See also the more recent cases of *Douglas v. Baynes*, [1908] A.C. 477, at p. 482, and *Lyttleton Times Co. v. Warners Limited*, [1907] A.C. 476, at p. 481.

It must always be a delicate matter to imply a term. One thing that must certainly appear is that the term to be implied was clearly within the intention of both parties, the implication being justifiable only for the purpose of giving effect to such mutual intention. And, while I have no doubt that both parties intended when this contract was made that the proposed book should be published as one of the series, and that such publication formed a material part of the consideration to the plaintiff in undertaking the work, I am, with deference, unable to quite adopt the view of Clute, J., that there is good ground in the circumstances to infer an absolute and unconditional term to publish.

The book was intended to form one of a series. It was wholly unwritten. The defendants, and not the plaintiff, were to take the risk of publication. The plaintiff was, doubtless, looking not merely for money but for reputation as an author (see *per* Tindal, C.J., in *Planché v. Colburn* (1831), 8 Bing. 14, 34 R.R. 613, at p. 614); but the defendants were mainly interested, as a business concern, in making a profit, or at all events, as far as possible, avoiding a loss. They had already had one satisfactory book from the plaintiff, and had, in the circumstances, every reason to expect an entirely satisfactory result in the case of the book now in question. But, as prudent business men, it seems to me very doubtful that, if they had been asked, they would have agreed, in advance, to publish whatever the plaintiff might write.

A more probable inference, and one which the circumstances would, I think, justify, is this, that if, when the book was written,

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it was considered by the defendants to be from any cause unfitted for the series, they would "at all events," in the language of Bowen, L.J., return the manuscript and thus enable the plaintiff to secure publication elsewhere. They had no right, under any view of the agreement, to keep it, and also refuse to publish. That was never contemplated by either party. It is unnecessary to consider whether in the case of such an inference there would be the further inference of a condition that the plaintiff should also return what he had been paid, because he submits to do so, and abandons all claim to damages.

Another view may be presented, and it is this. A contract to prepare a manuscript, notwithstanding its peculiar nature, must be subject to similar warranties and conditions to those implied by law in the case of any other article to be provided under contract by its manufacturer, such as to the quality, condition, and fitness for the purpose intended. The defendants did not apparently reject the book because of careless or defective work, but rather because of the conclusions reached, which they in effect say, in their letter to the plaintiff, were contradictory of the contents of others of the books in the series, and were such as would probably prejudicially affect the sale, not merely of the book itself, but of the whole series. This was, I think, a complete rejection of the book, whether the reason was or was not a valid one, and such as the defendants might urge under the contract. The plaintiff was thereupon, in my opinion, at liberty to waive any objection to the sufficiency of the reason and accept the rejection as within the defendants' rights under the contract, and as final, upon which the contract would be at an end; and the defendants entitled to get back their money and the plaintiff his manuscript. And this is exactly the position taken by the plaintiff, who, as soon as he was informed by the defendants that the book was not satisfactory, offered to return the \$500, and demanded back the manuscript.

While, therefore, I differ from Clute, J., as to the reasons, I agree in the result at which he arrived. And the appeal should, therefore, in my opinion, be dismissed with costs.

MACLAREN, J.A.:—The defendant company appeal from the judgment of Clute, J., rescinding the contract between the parties and ordering the defendants to return to the plaintiff his manu-

script copy of the life of William Lyon Mackenzie, on his returning the \$500 paid him therefor.

The dispute between the parties is whether the publication of the work was an implied term of the contract. The plaintiff contends that it was; the defendants contend that it was simply a purchase of the manuscript, and that, on payment of the price, the manuscript became the absolute property of the company to do with it whatever they pleased. The defendants contend that the whole contract is contained in three letters of the 6th, 7th, and 11th December, and there is no promise to publish in any of these.

The trial Judge held that the whole contract was not in these three letters, and that it was impossible to find what the contract was without importing into it the facts and circumstances under which it was made. In this, I think he was quite right. Indeed, in the last of these three letters the defendants speak of the plaintiff's letter of the 7th December, "in which you accept our offer to do 'William Lyon Mackenzie' for the sum of \$500 payable in instalments of \$250 as outlined." The reference to instalments is as to the payment for the plaintiff's *Life of Frontenac*, where \$250 was to be paid on the first publication, and \$250 on the publication of a second edition. This is one of the proofs that publication was in the mind of both parties, and the plaintiff swears that the publication in the series of "*The Makers of Canada*" formed a large part of the consideration, and his evidence is fully accepted by the trial Judge. It would require but slight evidence to establish this; for it may almost be said to be common knowledge; as stated by Tindal, C.J., in *Planché v. Colburn*, 8 Bing. 14, at p. 15, "the considerations by which an author is generally actuated in undertaking to write a work are pecuniary profit and literary reputation."

If the parties had entered into a formal contract in writing respecting the Mackenzie book, as they did about that on *Frontenac*, or if the whole contract had been embodied in the three letters referred to, then the principle invoked by the defendants against going outside of these would have applied. But these letters are manifestly incomplete, and, as we have seen, refer to previous writings, and I am of opinion that the trial Judge was quite right in importing into the contract the facts and circumstances under which it was made. The plaintiff was one of three editors of the defendants' series of books, "*The Makers of Canada*," and had

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already written one of these books, the *Life of Frontenac*, and the defendants had discussed with him the writing of others. The contract for the *Frontenac* volume was on what has been called the standard form for the series, with the blanks filled up, and these had been subsequently modified in some particulars. When the defendants spoke to the plaintiff about his writing the life of Sir John Macdonald, which, however, was not carried out, it was well understood by both parties that it was for publication as one of the series, and it was to be on the same terms as the *Frontenac* volume. I am of opinion that the surrounding circumstances all point to the conclusion that this was an implied term of the contract as to the life of Mackenzie; just as it was an implied term that the book to be written by the plaintiff would be a suitable one for the series, although this is nowhere expressed. Other items of the standard or *Frontenac* contract, being well known to both parties, as those under which the defendants were making arrangements respecting this series, would be held to be part of the contract, if nothing inconsistent with them appeared.

There does not arise, in this case, in my opinion, any question of copyright law. The question is one of fact—what were the terms of the contract between the parties? The trial Judge has come to the conclusion that publication was one of them, and the evidence appears ample to sustain his decision. But there is more. Morang must be presumed to have known that the plaintiff would look upon the reputation which he as a literary man would gain by the publication of the work as a large part of the consideration, as put by Chief Justice Tindal, and, when the plaintiff gave his testimony as to the importance of this consideration, the defendants did not offer any evidence to the contrary, or that they were not well aware of this.

After the arrangement was made, the defendants widely published the fact that the proposed work was to be one of the series, and it was announced as "Volume XI., William Lyon Mackenzie, by W. D. LeSueur, author of *Count Frontenac* in the same series," with a synopsis of the contents and leading points.

If the plaintiff had seen fit to claim damages for breach of contract, I think he would have been entitled to them. He having abandoned them at the trial, I see no reason for withholding from him the lesser remedy, *viz.*, the rescission of the contract, and a re-

turn of his manuscript, on his returning the \$500 which he received, as he has expressed his willingness to do.

The appeal should be dismissed.

MEREDITH, J.A.:—Agreeing with the learned trial Judge in his findings of fact, I have no manner of doubt that the publishers are altogether in the wrong, in this case; and, more than that, that they are themselves quite well aware of the fact, and are defending this action, if they are really, and not merely in form, defending it at all, at the instance of interested third persons: it therefore follows that the author ought to have the fullest relief that law, or equity, can rightly give; and the only sort of doubt I have ever had in the case was as to what that relief is.

The parties never attempted to put their agreement into any sort of a formal writing; and so we are left to gather its terms from what passed between them, upon the subject, and the surrounding material circumstances, putting ourselves as well as we can in the position the parties occupied at the time.

It is quite material, as the trial Judge observed, to know the terms of the prior contract between the same parties in respect of a similar work, for the same series of books. That contract was in writing, and in it the publishers expressly agreed to publish the work, and pay for it by way of a royalty. Subsequently the parties mutually agreed to change that mode of payment, substituting for the royalty the sum of \$500, one half on the first publication of the book, and the other half on the publication of the second edition; but no change was made in any other of the terms of the contract, and so the publishers were bound to publish that work.

When this change was made the publishers proposed to the author that he should write another book—"Macdonald"—"on the same terms" as the first. Subsequently the publishers suggested to the author that "Mackenzie" would offer better opportunities to him than "Macdonald;" and eventually it was agreed between them that he should write "Mackenzie" for "\$500, payable in instalments of \$250 as outlined;" that is, as outlined in the letter of the 4th October, 1905, \$250 on the publication of the book, and \$250 on publication of the next edition. So that, at the outset, there seems to me clear evidence in writing of an obligation to publish. Subsequently the author took up other work for the

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publishers; and, apparently being in need of money, drew in monthly payments enough to cover the "Mackenzie" \$500 and all other moneys coming to him from the publishers, before the work was written; but I do not see how that can in any sense relieve them from their contract to publish. However, if that were not so, if there were no expressed promise to publish, there was undoubtedly, in my opinion, a tacit or implied one—it seems to me to be immaterial which it may be called, though I prefer the former name.

It is to be borne in mind that the author was not selling a pig or any other goods, wares, or merchandise; he was selling the offspring of his intelligence and education, a thing the chief value of which was in its intangible properties: he was selling it for a specific purpose, publication in the series to be called "Makers of Canada." Under all the circumstances of the case, can there be any reasonable doubt that there were the two corresponding and depending tacit, if not expressed, obligations: (1) that the book would be reasonably fit for the purposes for which it was written; and the other (2) that, if so fit, it would be published.

It hardly needs the testimony of the author to shew that the money paid was only part of the consideration for the work done; that the benefits to be derived from the publication are ordinarily, and were in this case, a large part of the whole consideration.

If the parties had put the agreement into writing, as they did the earlier one, can it be doubted that an agreement to publish would likewise have been inserted. If it had not been, when presented for execution, and the author had intimated that it should be added, can any one doubt that the publishers would have at once assented, intimating that that was that for which they were obtaining the work, and paying the price?

If the work were unfitted for that series, could not the publishers reject it, though there was no expressed stipulation to that effect? And, if so, why not the corresponding implied or tacit obligation? I speak, of course, having regard to all the facts of this particular case, not to all cases and under all circumstances.

My conclusions upon this question of fact are therefore: that there was an expressed contract to publish, but, if not, there was a tacit one.

This brings me to the contention that the work was rejected

because not suitable for the purpose of publication as one of the books called "Makers of Canada;" see paragraph 2 of the reasons for this appeal; a contention which, out of the mouths of the publishers, seems to me a singularly unfortunate one. First, because it seems to me to be quite plain that the work was not really rejected upon that ground, but was rejected at the instance of interested third persons for their own purposes: that would be plain enough without the evidence afforded by the publishers' avoidance of the witness-box and its searchings, their persistent effort to strangle and obliterate the author's "offspring," and the publication of the work of one of those persons in the place of that in question, facts which even in themselves should leave no room for doubt upon this question, but when again strengthened by the publisher's warm condemnation of those persons and their "impertinent" interference in the days before his surrender to them, it becomes unquestionable. Second, because, if the plea were true, the result would be that the plaintiff should succeed in this action. The relative rights of the parties would be a return of the money and a return of the manuscript. If true, the publishers' right was to rescind the contract, not to make a new one. They were bound to elect, and, if their election were against the work, it is obvious that they could not lawfully retain it; it was not their property, it remained the property of the author: whilst, if their election were to take the book, they were bound to take it subject to all the terms of the contract, including publication. They cannot blow hot and cold.

There is another view of this case which, though not referred to upon the argument, should not be passed over. If it could be found that the publishers did not intend to enter into any contract to publish the book, then, as it is quite clear that the author not only did, but that the publication was a most important part of the consideration he was to receive, it would follow that the parties were never at one, and so there was no contract, and the result would be that the publishers would be entitled to a return of the \$500 and the author to his manuscript, which is all that he claims. So that, however looked at, the plaintiff is entitled to succeed.

This brings me to the question of the relief which can be given to him upon the facts as I have found them. If sought, he would be entitled to damages for breach of the agreement, retaining the \$500, but that he does not seek. He might also bring his action

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for damages against the third persons for inducing the publishers to break their agreement. Whether he is entitled to the relief which he seeks, a return of the manuscript, the money being returned by him, depends upon whether he had power to rescind the contract for breach of the agreement to publish the work, and that, it is said, depends upon the question whether the contract was entire, so that a partial means an entire failure of consideration: see *Chanter v. Leese* (1839), 5 M. & W. 698: see also *Barrie v. Earle* (1886), 143 Mass. 1. That the contract was entire I have no doubt. The agreement to publish was an essential part of it, without which that contract, at all events, would never have been entered into by the author. The contract, as evidenced by the letters, was first to publish and then to pay; and the publishers were not, as I find, to become the owners of the manuscript, and the greater intangible rights of authorship, until publication: the possession of the manuscript and power to acquire the other right were necessarily conferred upon the publishers, but the property was not to pass until publication; and, in any case, the agreement to publish was not a warranty or merely an independent contract.

So that, looked at as a common law action only, the plaintiff was entitled to the relief he sought. But, assuming that that is not so, that all that a Court of common law could do would be to award damages for breach of the agreement, and that such damages would be only nominal—however much the author suffered—because damages beyond that would be too uncertain and remote, then, would not the case be especially one for the intervention of a Court of equity, and for enforcing publication? It would be no defence for the publishers to set up their own wrong in substituting another work, and completing the series, in breach of their contract; nor, perhaps, would it be altogether a profitless proceeding in view of the advertising of the publication which this litigation may afford; at all events, if the plaintiff desired it, no one else could object.

The judgment directed to be entered for the plaintiff was, therefore, right, in substance, and is sustainable on more than one ground, but the form of that judgment, though not objected to, is, I feel bound to say, quite inaccurate and inartistic; the Court does not rescind contracts, the parties do, or one of them does; the Court merely gives effect to their rights consequent upon such a rescission.

I have no manner of doubt that this appeal should be dismissed.

OSLER, J.A., agreed in the result.

MOSS, C.J.O. (dissenting):—This is a very peculiar case, and it is perhaps not surprising that there should be diversity of view not only as to the plaintiff's right to succeed against the defendants, but also as to the grounds on which a judgment in his favour should be based.

The plaintiff, a well-known literary man, having agreed with the defendants to compose for them a biography of William Lyon Mackenzie, for which work he was to be paid the sum of \$500, and having delivered to the defendants the manuscript which he had prepared, now seeks to compel the defendants to hand back to him the manuscript so delivered on receiving from him the \$500 which he offers to restore.

The judgment now under appeal adjudges that the contract to write the Life of William Lyon Mackenzie be rescinded, and that, upon the plaintiff paying to the defendants the sum of \$500, they do forthwith deliver to the plaintiff the manuscript in question.

The learned trial Judge did not, in his judgment delivered at the conclusion of the trial, expressly declare a rescission of the contract, but in substance the formal judgment gives the plaintiff the relief which the learned trial Judge thought him entitled to.

In his statement of claim the plaintiff asked for delivery of the manuscript and damages for its detention, but, as the record shews, the claim for damages was abandoned.

So far as substance is concerned, therefore, the action stands reduced to a claim for the specific delivery of the manuscript to the plaintiff. If the plaintiff is entitled to such relief, it cannot be as upon rescission, but, if at all, by way of performance of a term of the contract.

There is here no question of unlawful conversion by the defendants, or any suggestion that the property in the manuscript did not pass to the defendants. If any such grounds had been put forward, it would have lain upon the plaintiff to clearly establish them, and, as the case appears to me, the evidence entirely fails to support such a contention.

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It is not disputed that the writings which form the contract express nothing beyond an agreement for the sale and purchase of the manuscript. And the plaintiff in his testimony at the trial stated that nothing passed in conversation between him and the defendants concerning the bargain which would alter or vary the terms of the writings.

It is true that the defendants dealt with the plaintiff with the expectation of publishing his production in the series of "The Makers of Canada," and that the plaintiff wrote it with that end in view, but there was no word between them which binds the defendants to make such or any use of it, unless, in their judgment, they think proper to do so.

It was scarcely contended that there was an absolute obligation on the defendants to publish the manuscript—one which deprived them of the right of judgment upon it—that they were bound to make it one of their series without regard to its character and whether it was suitable or unsuitable, or in harmony or out of harmony with the general design. But it is contended that, when the defendants determined not to publish it, they were bound to return it to the plaintiff if he demanded it and tendered back to them the sum he had accepted in payment for it.

Now, whatever right the defendants might have, in case the manuscript did not, in their opinion, attain the standard they had set, to reject it, and, by analogy to a sale of goods by sample or subject to warranty, express or implied, that they were merchantable, or would answer a particular purpose, return it and demand repayment of the purchase money, I fail to see how the plaintiff can claim a correlative right.

A purchaser of goods which on delivery do not appear to comply with sample or warranty is not obliged to reject them. He may accept them if he chooses and abide by such loss as he may sustain. And the vendor has no right of action to compel him to reject and return the goods. If the vendor has not been paid, he can sue to recover the price; if he has been paid, the transaction is complete. Why may not the defendants be entitled to retain the manuscript, even though it is not of the standard?

It is said that it is an implied term of the transaction now in question between the plaintiff and defendants that, in the event of the defendants determining not to publish the manuscript, they

would return it. Why should such a term be implied as arising from the nature of the transaction? The plaintiff must be held to have known that, if the defendants did not consider it desirable to publish his article, they would be obliged to obtain elsewhere an article which would answer their requirements. Then why should it be considered that they were agreeing in such case to put the plaintiff in a position to compete with their publication by placing on the market a rival article? If the defendants became bound to restore on demand, then the plaintiff should also be bound to repay on demand, but there is nothing to shew that he agreed to this. Having paid the plaintiff what he demanded for his production, had the defendants not the right to do with it as they chose, to use it immediately, not use it at all, or hold it for use at some future time if they saw fit? The plaintiff has no right to complain if, because, unfortunately, he has apparently treated the subject from a point of view which, in the defendants' opinion, is not in harmony with the general design of the series, they have deemed it proper not to publish his article. They considered that its publication might jeopardize the success of their work, and would therefore be injudicious. Can it be maintained that in so doing they were not acting reasonably and fairly within their rights? How can their action entitle the plaintiff to undo the bargain and sale consummated by payment for and delivery of his manuscript?

It is said, however, that there are to be imported into the bargain to write the Life of Mackenzie terms similar to those upon which the plaintiff undertook to write the Life of Frontenac, and that, inasmuch as the bargain with respect to it included payment by royalties, which implied publication, a similar term is to be implied in this case. It is to be borne in mind that, before the bargain in this case was entered into, the term of payment for "Frontenac" by royalties had been abandoned, and the plaintiff had agreed to accept a lump sum by way of payment. Payment by royalties would naturally imply publication, otherwise the remuneration would never be realized. But by the terms of the modified bargain as to "Frontenac" as finally settled, the plaintiff was to be paid, publication or no publication.

To quote the plaintiff's own statement, p. 20:—

"He (Morang) proposed that I should commute my rights for \$500, and I then considered my Frontenac contract amended to

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that extent. Instead of the royalty I was to have this commutation of \$500.

"Q. He was to pay you \$500? A. In lieu of royalty.

"Q. And the copyright on Frontenac belonged to him? A. Under the contract, yes.

"Q. Belonged to him at that time? A. Oh! yes."

And he was paid the \$500 without any reference to a second edition: see his evidence pp. 20 and 21, beginning with his answer to the question, "You had no idea there was to be any royalty basis about Mackenzie?" He there makes it quite plain that the payment of the \$500 for "Frontenac" was not at all dependent on the issue of any edition of the series. In the case of "Mackenzie" nothing was ever said about publication. The plaintiff was to be paid \$500 for his manuscript, and for that sum the defendants were to become the owners.

This is not a case of disputed property in the copyright, but it is scarcely to be doubted that the effect of a dealing of the character that took place in this instance is to entitle the purchaser to the copyright; see R.S.C. 1906, ch. 70, sec. 18; and *Lawrence & Bullen Limited v. Aflalo*, [1904] A.C. 17, in which the cases are discussed.

But, leaving that aside, the effect, as shewn in the cases in which the question has arisen, is to entitle the purchaser to deal with the manuscript in such lawful manner as he may think best in his own interests.

I am unable to see anything in the circumstances of this case to distinguish it from what appears to be the ordinary rule, or to import into the agreement between the parties the element of obligation to publish, and, in case of failure to do so for any reason, to return the manuscript.

The plaintiff does not profess to have suffered any damage other than a possible failure to acquire additional reputation as an author. In a pecuniary way he has received the compensation he bargained for, and he does not ask for more.

No authority has been cited and I am not aware of any which supports the right the plaintiff claims, to a specific delivery of the manuscript. And, there being no claim for damages, the action fails, and, in my opinion, should be dismissed.

I would allow the appeal and dismiss the action with costs.

[IN THE COURT OF APPEAL.]

CLARK v. BAILLIE.

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April 9.

Broker—Purchase of Shares for Customer on Margin—Hypothecation—Conversion—Delivery of Shares—Contract—Terms of Bought Notes.

The plaintiff sued for the conversion of and other wrongful dealings with shares of stock purchased for her by the defendants as her brokers, "on margin," the complaint being that the defendants had pledged the shares bought for the plaintiff for a larger amount than that owing by the plaintiff:—

Held, on the facts, that there was no breach by the defendants of their contract with the plaintiff, which was largely a tacit one, both parties understanding the terms on which they were dealing.

2. That the terms of the bought notes afforded at the least some evidence of what the real tacit contract was; and they very plainly set forth a term as to raising money upon the bought shares, in any way most convenient to the defendants.

3. That, assuming that the defendants were guilty of converting the plaintiff's shares, she could not recover; for, at the appointed time and in the agreed manner, her shares were duly transferred to her, accepted, and re-sold and re-transferred by her; and the "conversions" brought no profit to the defendants nor loss to the plaintiff.

Conmee v. Securities Holding Co. (1907), 38 S.C.R. 601, distinguished.

Order of a Divisional Court, 19 O.L.R. 545, affirmed.

AN APPEAL by the plaintiff from the order of a Divisional Court, 19 O.L.R. 545, affirming the judgment of MACMAHON, J., *ib.*, dismissing the action, which was brought to recover damages for the conversion of and other wrongful dealings with shares of the capital stock of certain incorporated companies, purchased for the plaintiff by the defendants as her brokers. The facts are stated in the report of the judgments in the Court below.

February 8. The appeal was heard by MOSS, C.J.O., OSLER' GARROW, MEREDITH, J.J.A., and SUTHERLAND, J.

W. C. Mackay, for the plaintiff. The defendants failed in the duty which they owed to the plaintiff to hold the shares purchased for her, at all times available for delivery to her, upon payment of the balance of the purchase money: *Conmee v. Securites Holding Co.* (1907), 38 S.C.R. 601, at p. 608. The condition on the bought note which was delivered after the making of the contract between the parties, does not invalidate the conditions of the prior contract: *Lamont v. Canadian Transfer Co.* (1909), 19 O.L.R. 291; *Ames v. Conmee* (1905), 10 O.L.R. 159, *per* Anglin, J., at p. 174. The alleged custom, relied on by the defendants, is not a custom of the Stock

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Exchange, or a universal custom valid in law, but a mere custom of brokers, which was unknown to the plaintiff, and, being unfair and unreasonable, is not binding upon her. The evidence shews that only in one case had the defendants fulfilled the duty which they owed to the plaintiff to effect a complete purchase of the shares ordered by her, and, if it should be considered that the shares were actually purchased, they were immediately disposed of by the defendants, contrary to the duty which they owed to the plaintiff: *Haight v. Haight* (1906), 98 N.Y. Suppl. 471, at p. 474, 112 N.Y. App. Div. 475, at pp. 480-483; *Brookman v. Rothschild* (1829), 3 Sim. 153, affirmed in *Rothschild v. Brookman* (1831), 5 Bligh N.R. 165. The proper method of dealing with shares so purchased is indicated in such cases as *Taussig v. Hart* (1874), 58 N.Y. 425, *Gillett v. Peppercorne* (1840), 3 Beav. 78, and *Sutherland v. Cox* (1887), 15 A.R. 541. The conduct of the defendants with regard to the shares amounted to a conversion, of which the plaintiff was not aware until after she had taken delivery of the shares alleged by the defendants to have been purchased for her.

I. F. Hellmuth, K.C., and *E. G. Long*, for the defendants. The dealings between the plaintiff and the defendants were carried out in accordance with the customs of the Toronto Stock Exchange, and of the New York Stock Exchange, on which the stocks in question were purchased, with which the plaintiff was familiar, and which were in accordance with previous dealings between the parties. The customs in question, even if of recent growth, are valid and binding: *Edelstein v. Schuler & Co.*, [1902] 2 K.B. 144. The plaintiff, by employing the defendants to transact business for her upon the Stock Exchanges, authorised them to deal according to their known customs, and is bound by them, even though not aware of their existence: *Hodgkinson v. Kelly* (1868), L.R. 6 Eq. 496, at p. 502; *Forget v. Baxter*, [1900] A.C. 467; *Forget v. Ostigny*, [1895] A.C. 318. The defendants were entitled to re-pledge the plaintiff's stock, and such re-pledge did not put an end to the contract existing between the parties: *Johnson v. Stear* (1863), 15 C.B.N.S. 330; *Donald v. Suckling* (1866), L.R. 1 Q.B. 585; *Halliday v. Holgate* (1868), L.R. 3 Ex. 299. Even though the defendants should be considered to have made a technical conversion of the stock, the plaintiff has suffered no damage thereby, and can recover none: *Johnson v. Stear*, *Donald v. Suckling*, and

Halliday v. Holgate, above cited; *Hjort v. London and North Western R.W. Co.* (1879), 4 Ex.D. 188.

Mackay, in reply.

April 9. The judgment of the Court was delivered by MEREDITH, J.A.:—The plaintiff having received from the defendants all that she bargained for, at the time when and in manner in which she was to receive it under her contract with them, and having sold and converted to her own use that which she so received, brings this action to recover part of the agreed price paid by her to them, and the amount paid to them by her, under her contract with them, for their commission and for interest, together with interest upon each of such sums and damages; and the sole ground of her action is that the defendants dealt with the subject-matter of the contract, between the time of the making of the contract and the time when the plaintiff became entitled to it, in a manner not authorised by the terms of the contract, and although such dealing was without profit to them or loss to her. In these circumstances, it seems to me to be obvious that the plaintiff cannot have any good cause of action, unless the law imposes some extraordinary penalty upon stock-brokers not applicable to the rest of mankind; and to be equally obvious that there is no such extraordinary law.

For two plain reasons, the plaintiff's action seems to me wholly to fail, and to have been rightly disposed at the trial and in the Divisional Court.

In the first place, I have no difficulty or doubt in finding that there was no breach by the defendants of their agreement with the plaintiff. That agreement was largely a tacit one; the terms of it were not put in writing or expressed. The plaintiff was speculating in stocks—"buying on margin;" the process was not new to her. She necessarily knew that the price of the stock, over and above the small "margin" paid by her, had to be borrowed by her brokers for her, and that interest had to be paid to the lenders as well as to the brokers, beside their commission upon the transaction. None of these things were expressed; there was no need that they should be; they were incidents of all such transactions. Now, having regard to all the circumstances of the case, no reasonable jury could, in my opinion, come to any other conclusion than that the tacit agreement of the parties was, that the usual course of business of

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the defendants, which was that of all other reputable stock brokers, should be adopted and followed in this case; and all that the defendants did was strictly within that course of business. But it is said that if the plaintiff did not know of the incidents of that course of business she could not have assented to them, that only to such as she was aware of could she be considered as assenting. A wholly fallacious argument. It is very obvious, on the contrary, that one may, as one very often does, agree to terms, prices, and conditions of which he is not aware; in dealing with a reputable tradesman is quite willing to pay his ordinary prices and accept his usual terms. Of this transaction and of the thousands of like transactions immediately preceding and immediately following it, it was certainly never intended that this one was to be a single exception. There is no law upon the subject, except that, whatever the contract was, the parties are bound by it; it is essentially and entirely a question of fact; and so neither *Connie v. Securities Holding Co.*, 38 S.C.R. 601, nor any other case, is a binding authority one way or the other; though, it may be added, no such question of fact seems to have arisen in the case I have just mentioned.

The terms of the bought notes are also significant upon this question. They were printed, drawn, and used, in the defendants' ordinary, if not invariable, course of business; and they very plainly set forth a term as to raising money upon the bought stock. But it is argued: (1) that that term forms no part of the contract, because the note was not delivered at the inception of the contract; and that anyway (2) it means nothing. I am, however, far from being able to assent to either of these contentions. The bought note was an essential part of the contract, intended, from the first, to be given, and to be the best evidence of the transaction, in respect of all things to which it properly related; and as such it was given by the defendants and accepted by the plaintiff; and so I should have thought at least *prima facie* evidence in respect of the matter in question. And, as to the other contention, why insert it at all if it meant nothing? It was obviously intended to mean something; to shew that the defendants had "reserved" some right which they would not have had without the plaintiff's concurrence. "In any way most convenient to us" can never have meant, merely in the way which the law allows without your consent. But in any case the bought notes so printed and used and so given and

accepted, at the least, afford some evidence of what the real tacit contract was; and, in my opinion, cogent evidence of that which, apart from this document, I have had no difficulty in finding it to have been.

But, even if all that were not so, assuming that the defendants were guilty of a score of "conversions" of the plaintiff's stock, how can she recover on the facts of this case? At the appointed time and in the agreed manner, her stock was duly transferred to her, accepted by her, and sold and transferred, beyond recall, by her; the "conversions" brought no sort of profit to the defendants, nor any sort of loss to the plaintiff; on the contrary, they brought in truth a gain to her, in the lesser rate of interest charged by the pledgees, because of the stock having been pledged in a "way most convenient" to the defendants. *Conmee's* case was very different in this respect. There the speculator receded when a loss became apparent, and never accepted that for which he had contracted.

I have no doubt that the appeal should be dismissed.

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[IN THE COURT OF APPEAL.]

MACKENZIE V. MAPLE MOUNTAIN MINING CO.

Company—Services of President—Remuneration—General By-law—Confirmation by Shareholders—Resolution Fixing Amount—Ontario Companies Act, sec. 88.

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The purpose or object of sec. 88 of the Ontario Companies Act, 7 Edw. VII. ch. 34, providing that no by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting, is that those who govern the company shall not have it in their power to pay themselves for their services without the shareholders' sanction.

And *held*, reversing the decisions of CLUTE, J., and a Divisional Court, *ante* 170, that there had been, on the facts there set out, a substantial, if not a literal, compliance with the enactment; and the plaintiff was entitled to recover the salary voted to him as president.

A seal is not necessary to the validity of a by-law, unless it is required by the constitution or by-laws of the company.

Distinction between a by-law and a resolution pointed out.

AN appeal by the plaintiff from the order of a Divisional Court, *ante* 170, affirming the judgment of CLUTE, J., dismissing the action.

The Divisional Court (FALCONBRIDGE, C.J.K.B., BRITTON and

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RIDDELL, J.J.) held (BRITTON, J., dissenting) that the plaintiff, who had been the president of the defendant company, was not entitled to a salary under certain by-laws and resolutions of the company and the board of directors, because sec. 88 of the Ontario Companies Act, 7 Edw. VII. ch. 34, had not been, in the opinion of the majority of the Court, complied with.

February 10 and 11. The appeal was heard by Moss, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A.

J. W. Bain, K.C., and M. Lockhart Gordon, for the plaintiff. It is submitted that there was an actual compliance with sec. 88 of the Ontario Companies Act. It was not necessary under that section that the directors should fix the amount of remuneration to be paid the president and directors. The shareholders in passing a resolution that the president was to be paid \$100 per month were simply exercising a right which they had, irrespective of the section. In any event, it was an additional confirmation of the by-law. The meeting of the directors after this meeting was unnecessary, but shewed at all events that they were in entire accord with the express wishes of the shareholders. Even if there was not an actual, there was a substantial, compliance with the section. It is submitted that when the shareholders met and passed the resolution relative to the remuneration of the president, and the directors met and confirmed it, it was clearly their intention to conform to sec. 88. The mere fact that the shareholders met first, and the directors afterwards, is of no importance, and *Beaudry v. Read* (1907), 10 O.W.R. 622, was wrongly decided. The real object of the section was to prevent the directors granting themselves remuneration without the sanction of the shareholders. In other words, the shareholders were to have the right of saying how much their president and directors were to be paid. It is also submitted that sec. 88 only applies in the event of the directors meeting and passing by-laws for their remuneration. It does not take away the right of the shareholders to say how much the officers and directors are to be paid. The absence of the seal is not material, as it is only evidence of the contract, and in this case there is ample evidence of the intention of the parties. The following authorities were referred to: *Stephenson v. Vokes* (1896), 27 O.R. 691; *Lindley on Companies*, 6th ed., p. 272; *Swabey v. Port Darwin Gold Mining Co.* (1889),

1 Megone 385; *Imperial Hydropathic Hotel Co., Blackpool v. Hampson* (1882), 23 Ch.D. 1; *In re Gearge Newman & Co.*, [1895] 1 Ch. 674; *Salton v. New Beeston Cycle Co.*, [1899] 1 Ch. 775, at p. 778; *Lambert v. Northern Railway of Buenos Ayres Co.* (1869), 18 W.R. 180; *Isaacs' Case*, [1892] 2 Ch. 158; *Burland v. Earle*, [1902] A.C. 83.

R. C. Levesconte, for the defendants. There were no real by-laws, as they were not under seal. The meetings both of the directors and of the shareholders were irregular, and the provisions of the Ontario Companies Act were not complied with. The defendants rely upon the judgment of Riddell, J., in *Beaudry v. Read*, and the cases there cited, also upon the cases cited in the judgment of Falconbridge, C.J., in the Divisional Court. The following cases and authorities were also cited: *Birney v. Toronto Milk Co.* (1902), 5 O.L.R. 1; *Benor v. Canadian Mail Order Co.* (1907), 10 O.W.R. 899, 1091; Lindley on Companies, 6th ed., pp. 269, 426. The cases cited on behalf of the appellant are not applicable, as in them the by-laws formed part of the articles of incorporation.

Bain, in reply.

April 9. OSLER, J.A.:—I have given this case the best consideration in my power, and in the result find myself in agreement with the opinion of Britton, J., rather than with the prevailing opinions in the Divisional Court.

The object of the provision in the Companies Act relating to the payment of the directors or the president of the company for their services was that the authority or approval of the shareholders should be obtained before that should be done. It was not to depend upon the authority of the directors alone: The Ontario Companies Act, sec. 88. The provisional directors of this company passed general by-laws of the company, art. V. of which, under the heading "Officers," after specifying the various officers and their duties, provided, sec. XII., that the president, vice-president, and directors should receive "remuneration" for their services as might by resolution of the board of directors be determined, and that no further by-law or confirmation by the shareholders other than the confirmation of the general by-law should be necessary to provide for such remuneration. "Remuneration" is "a fair name" for payment; and, doubtless, may mean something more substantial than "three farthings or a French crown."

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As Britton, J., points out, the provisional directors had authority to pass by-laws, but they must be submitted to a general meeting for the sanction of the shareholders: secs. 34, 79.

At a general meeting of the shareholders the general by-laws were unanimously confirmed, ratified, and adopted as the general by-laws of the company, and at an adjournment of that general meeting, held at a later hour on the same day, the shareholders passed a unanimous resolution, duly recorded in the minutes, that the president of the company—the plaintiff—should be paid a salary of \$100 monthly.

Then at a subsequent meeting of the elected directors a resolution was passed, and duly recorded, that, pursuant to the resolution of the shareholders, a salary of \$100 per month should be paid to Mr. Ewan Mackenzie as president.

I agree with Britton, J., that in substance all that the Act requires has been done. The mind of the directors has been expressed: so also has that of the shareholders, and exactly to the same purpose and with the same result.

The resolution of the directors is properly to be regarded as a by-law. It is true that a resolution is not necessarily a by-law, but a by-law may be enacted in the form of a resolution where the object to be accomplished is the subject of a by-law, that is to say, a rule or law of the corporation for its government, any forms or requisites prescribed by the statute or charter creating the corporation, or by its general by-laws, being also complied with.

“A by-law differs from a resolution, in that a resolution applies to a single act of the corporation, while a by-law”—as in the present case—“is a permanent continuing rule, which is to be applied to all future occasions:” Thompson on Corporations, 2nd ed., vol. 1, sec. 977. “The function of a by-law is to prescribe the rights and duties of the members with reference to the internal government of the corporation, the management of its affairs, and the rights and duties existing between the members *inter se*.” *ib.*, sec. 975; *Drake v. Hudson R.R. Co.* (1849), 7 Barb. (N.Y.) 508, 539; see also Thompson on Corporations, *supra*, sec. 970, Am. & Eng. Encyc. of Law, 2nd ed., vol. 5, pp. 87, 88; Cyc., vol. 6, p. 262.

In the case of these defendants nothing in the statute or general by-laws requires that a by-law shall be in any particular form or that it shall be under the seal of the company.

The objections urged on these grounds, therefore, also fail. See Lindley on Companies, 6th ed., vol. 1, p. 426; Morawetz on Private Corporations, 2nd ed., vol. 1, sec. 498; Angell and Ames on Corporations, 11th ed., secs. 216, 325.

The appeal will be allowed with costs and judgment entered for the plaintiff for \$525, as proved, with costs on the High Court scale.

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MEREDITH, J.A.:—It is now contended, apparently for the first time, that the organisation meetings of the company were not regularly held, and that, therefore, the agreement to pay the plaintiff was invalid; but no such contention is now open to the respondents; no evidence was directed to it at the trial, nor was it in any way dealt with there, so that there is no evidence upon which it could be now considered; nor can I think that, if there had been, it would prove a serious obstacle.

It was also contended that the by-laws of the company were invalid, because, as it was alleged, they were not under seal; but this again is a question not now open to the respondents, for the same reasons.

If one can hope by such objections to establish in law that all the acts of the company are without lawful foundation and invalid, he must at least lay the foundation for his contention in facts duly established in the progress of the action.

I see no way of opening the gate to wider contentions than such as were dealt with at the trial, and in the Divisional Court; nor any justification for doing so, if it were possible.

The trial Judge found against the respondents upon the question of fact raised at the trial; but came to the conclusion that there had not been a compliance with the provisions of the enactment in question sufficient to entitle the appellant to recover in this action, even upon the facts as proved by him; and that is really the only substantial question in this appeal.

There is no sufficient ground for reversing any of such findings; so the single question is one of the proper interpretation of the enactment, which is in these words:—

“88. No by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting.”

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A by-law was passed by the company's board of directors providing that the president, among other officers, should receive such remuneration for his services as might by resolution of the board be determined.

A general meeting of the shareholders confirmed that by-law; and also by resolution fixed the president's salary at \$100. Subsequently the board, in the same manner, fixed the same salary at the same amount: the plaintiff filled the office for a little more than five months, upon the understanding and agreement that he was to be paid accordingly; and he was credited with the amount of his salary in the books of the company, and now appears in them as its creditor for the amount which he claims. In February, 1908, a meeting of the shareholders passed a motion "annulling" the payment of the \$100 a month to the president; and it is up to this time only that the salary is claimed.

In these circumstances, there seems to me to have been a literal as well as a substantial compliance with the terms of the enactment in question, and with the terms of the by-law also.

There was a by-law of the directors, for the payment of the president, confirmed at a general meeting of the shareholders; and there was, under the by-law, a resolution of the shareholders fixing the amount of remuneration; and there was a due performance of the duties of his office by the president upon the faith of being so paid.

The Judges in the Courts below seem to me to have dealt with the case as if the statute required that each contract, for such payment, should be confirmed by the shareholders, which, of course, is not the case. It is a by-law with which it expressly deals, and by-laws ordinarily deal with the subject in a general way; the contract deals with a specific case under the general authorisation of the by-law.

A by-law providing that the president and directors might be paid such sum as the general manager of the company should fix, would plainly be a by-law for the payment of the president and directors, and why would it not answer all the requirements of the enactment?

It would cause great inconvenience in many cases if the amount of each payment had to be embodied in a by-law which must be submitted to, and confirmed by, a general meeting of the share-

holders. It would be putting upon such a meeting the business of the general manager, and of the board of directors, as well as its own, without any good reason.

On the other hand, the interests of the shareholders are amply protected. The general meeting is not bound to confirm the by-law; it has ample power to protect the shareholders in refusing to confirm any by-law which it does not deem sufficiently specific, or, for any other reason, such an one as should not be given validity and be acted upon.

The purpose of the enactment is that those who govern the company shall not have it in their power to pay themselves for their services in such government without the shareholders' sanction. There is nothing to indicate that the shareholders must sanction the details of each payment; that would be quite unnecessary, and in many cases practically quite unworkable.

It is not necessary to consider whether the shareholders had power to limit the powers conferred on the directors by the by-law, or to make their confirmation of it subject to any conditions; for, if they had, the directors gave effect to such limitation, by fixing the payment at \$100 a month; whilst, if they had not, the motion fixing the amount had no force or effect. I may, however, add that I do not at present perceive why they might not impose a limitation or condition; but, even if not, they still have the whip-hand, they can refuse confirmation until a by-law in such terms as are quite satisfactory to them, is submitted.

I would allow the appeal, and direct that judgment be entered for the plaintiff in the action and damages \$525, as claimed.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

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Mines and Minerals—Patentees of Mining Rights—Owners of Surface Rights
—Roadway from Mines—Right of User—Right to Search for Minerals
—Townsite—Streets and Lots—Plan—"Located"—R.S.O. 1897, ch. 36,
sec. 42—Compensation—7 Edw. VII. ch. 18, secs. 23, 24(O.)

The plaintiffs, by virtue of letters patent from the Crown in 1905, and mesne conveyances, were the owners of the mines, minerals, and mining rights in, upon, and under the whole of mining claim J.B. 6, consisting of 40 acres, and, by virtue of a deed of transfer from the Temiskaming and Northern Ontario Railway Commissioners and mesne conveyances, were the owners in fee simple of a part of claim J.B. 6, described as lot 42. Claim J.B. 6 had, before these actions, become part of the townsite of Cobalt. The plaintiffs' mining works and buildings were on lot 42, and, in order to gain access with vehicles and teams to and from this portion of their property to the remaining parts of J.B. 6 and to and from Cobalt railway station, they constructed and used a roadway, which was the only route sufficient for the purposes of their business. The defendants, the town corporation and individuals owning surface rights in portions of J.B. 6 outside of lot 42, the title to which had been acquired subsequently to the acquisition of the plaintiffs' rights, sought to prevent the plaintiffs' further use of the roadway in so far as it crossed townsite lots, and to exclude the plaintiffs from searching for minerals in or upon the streets or townsite lots as laid out on J.B. 6:—

Held, that the title of the defendants was subject to all the rights expressed to be granted to the plaintiffs by the letters patent of 1905. The lands had not then been granted or leased, and had not been "located," in the sense in which that word is used in sec. 42 of the Mines Act, R.S.O. 1897, ch. 36, and therefore that section was not applicable.

The streets and lots in the townsite had been delineated and shewn on a plan before the construction of the plaintiffs' roadway, but the plan was not properly recorded until after the issue of the letters patent to the plaintiffs' predecessors in title:—

Held, that the grant carried with it everything reasonably necessary to the proper enjoyment and use of the thing granted, including such convenient way or ways, or means of ingress and egress, as were required; the delineation on a plan of streets for the use of the town-dwellers could not conclude the question of what was reasonable as a way or means of access to the plaintiffs' works, which had been in operation before the preparation or recording of the plan; and, the plaintiffs' roadway being the only practicable way by which they could bring in what was required for the working of their mines and carry away their products, the defendants had no right to interfere with the reasonable use by the plaintiffs of that roadway for their necessary purposes.

Held, also, that the plaintiffs had the right to carry on their mining operations in, upon, or under the streets and highways of the town, but subject to the provisions of secs. 23 and 24 of 7 Edw. VII. ch. 18(O.), and were entitled to the use and possession of the surface of the townsite lots owned or claimed by the individual defendants, so far as required to enable them to prosecute their mining rights and privileges.

Judgment of BOYD, C., varied.

THE first action was brought against the Corporation of the Town of Cobalt and the Jamieson Meat Company Limited, to restrain the defendants from interfering with the use by the plaintiffs of a certain roadway laid out and constructed by them over certain lots in the area owned by the meat company, and to restrain the defendants from interfering with the plaintiffs in searching for minerals upon the streets in the town of Cobalt, within the area of mining claim J.B. 6, or upon any of the lots, and for consequential relief.

The second action was brought against Israel Jacobson and Oliver Blais to restrain them from interfering with the plaintiffs' user of the roadway and from searching for minerals and carrying on mining operations on their lots.

The plaintiffs claimed title under letters patent to the mines, minerals, and mining rights in, upon, and under mining claim J.B. 6, situate within the corporate limits of the town of Cobalt.

The defendants other than the town corporation claimed title to certain lots laid out on the surface of the area comprised in mining claim J.B. 6, under sale from the Temiskaming and Northern Ontario Railway Commission, whose rights were derived from an order in council.

Several of the streets in the town lay within the area of mining claim J.B. 6.

The plaintiffs claimed the right to mine on the surface of the area. The defendants other than the town corporation maintained that they were entitled to have the surface of their lands undisturbed. The town corporation asserted the same right as to the streets, and also maintained that, if the plaintiffs had the right to mine in the streets, they must exercise such rights subject to the statute 7 Edw. VII. ch. 18, secs. 23 and 24.

November 24, 25, 1908, and January 11, 1909. The actions were tried together before BOYD, C., without a jury, at Toronto.

H. H. Collier, K.C., and Frank McCarthy, for the plaintiffs.

E. D. Armour, K.C., and George Ross, for the defendants.

January 19, 1909. BOYD, C.:—The contention in these cases is between the plaintiffs as patentees of mining rights and the defendants as owners of certain lots and streets in the townsite of Cobalt. The plaintiffs are the owners of mining rights over the

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locality wherein the defendants have surface rights, and the present dispute is of chronic character, going back to the time while yet the whole estate was in the hands of the Crown represented by the Ontario Government. I have read and considered all the evidence and the mass of documentary exhibits put in, and, while much of it is not without significance in the narrative of events and as to the situation of the parties, yet, it appears to me, the case falls to be decided under the legal rights and incidents of the parties under their respective documents of title. There are two matters presented for decision: (1) as to the right of the plaintiffs to use the roadway from the now worked mines; and (2) as to the right to search for minerals; such user and search affecting the townsite lots and streets of the defendants in both actions.

The plaintiffs' definitive title to the mining location J.B. 6, in the township of Coleman, was first acquired under the Crown patent dated the 9th December, 1905, implementing the record of his mining claim made on the 15th June, 1905. The status of the individual defendants arises under titles made to purchasers at the public sale of townsite lots on the 18th August, 1905, which were registered under the Land Titles Act on the 17th and 29th March, 1906. The defendants the Town of Cobalt hold the highways and streets under dedication from the Crown, manifested on the plan of the townsite made by O. L. S. Clark, dated the 28th September, 1905, and carried out by order in council of the 19th January, 1906, vesting the whole site in the Temiskaming and Northern Ontario Railway Commission. It was under this order in council that title was made to the purchasers of the lots in question.

The sale of the town lots was only of the surface rights, and the purchasers well knew of the mining rights of the plaintiffs over the townsite of Cobalt dealt with at the sale. And the Railway Commission took under the vesting order, with reservation of the mines and minerals and mining rights over the location J.B. 6 owned by the plaintiffs.

The plaintiffs' rights originated through the claim of discovery by one Trethewey on the 24th May, 1904, almost contemporaneously with the direction given by the Government to Mr. Surveyor Blair to make a survey of the township of Coleman (which was on the 16th May, 1904), then being waste and ungranted land of the Crown. There was a dispute touching this claim between Trethewey and

McQuigge, which was not disposed of in Trethewey's favour till the 18th May, 1905. Meanwhile, in June, 1904, the committee appointed by the Government to advise as to the location of townsites in the newly surveyed township through which the Temiskaming and Northern Ontario Railway ran, reported in favour of a townsite of 160 acres being set apart and established on Long Lake—the place now known as the town of Cobalt, and the very locality now under consideration.

This report, made on the 27th June, 1904, was followed by its adoption and instructions being issued to Mr. Blair to survey the townsite, a plan of which was enclosed. On the 22nd July, 1904, Mr. Trethewey was advised by the Department that his claim as to the 40 acres lay within the townsite of Cobalt; that, though the townsite covered the surface rights only, the Department was not in a position to deal with the mining rights on the townsites "until some arrangement has been formulated."

Unfortunately, no such arrangement for the adjustment and enjoyment of the material and apparently conflicting rights was ever formulated; hence these actions.

I need not follow up further the details. Suffice it to say that the attention of the Government was called to this township by the opening of the railway through it and the discoveries of valuable minerals, which led in succession to its survey and the location at townsites at various points likely to be of importance in the development and settlement of the country.

It would seem obvious, whatever the order of dates may be as between Trethewey and the plaintiffs claiming under him, on the one hand, and the Government, on the other, that the inception and progress of the mining claim, before it matured into a valid and recognised right, should be subject to any modifications which result from the general policy of the Government limiting the establishment of townsites and laying out of streets in the public interest in the township of Coleman. Therefore, while one may regret the fact that the mutual rights of the surface owners and the mining patentees upon the same territory were not defined and declared by the Government, while yet the absolute control and ownership was in its hands, there is no ground for suggesting, as appears in some of the papers, that there was any unfair dealing in letting the outcome be shaped as it now appears.

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The plaintiffs could not secure the particular form of conveyance they desired for themselves or for the purchasers, but took what they could get, apparently with the impression that if the title was first made to them in accordance with the priority attaching to the discovery made in May, 1904, they would in some measure be benefited. This was done, and the patent to the plaintiffs was first issued, and then the conveyance to the defendants, which is made subject to the mining rights of the plaintiffs. That is the situation I have to deal with.

An objection was made to the order in council vesting the lands being *ultra vires*. This rests on the proposition that the term used in the enabling statute 4 Edw. VII. ch. 7, sec. 3 (O.), giving power to transfer to the Commission "ungranted lands," is not apt as to townsites dealt with. There is no definition referred to as to what is meant by ungranted lands, but I cannot doubt that it applies to any land or any estate in land which it was in the power of the Crown to grant. The fact of the plaintiffs having mining rights in the lands did not derogate from the power of the Crown to dispose of the surface rights—which is all the Crown purported to grant. I would not give effect to this objection.

The way is thus cleared to take up the first point in controversy, as to the right of passage claimed by the plaintiffs over the lots sold to the defendants.

This way was formed for the purposes of mining prior to April, 1906, and after the new year by the removal of logs and stumps so as to form a partial clearing, of irregular diagonal course, across the townsite, used by waggons and sleighs over the snow, and was defined upon the ground. It led from the Coniagas mine on the north-west, trending westerly and south to the outlet on what is now called Prospect avenue. It was used as being the easiest and most accessible course to be taken over a new, wild, rocky country, and is, doubtless, more convenient and less hilly than any alley or road laid out upon the townsite which would give access to the mine then and now being worked. To block up this first way, and restrict the plaintiffs to the use of the public dedicated way, would involve some detriment to the plaintiffs, but letting it be as it is, carrying the travel over the lots purchased from the Commission and ultimately from the Crown, would involve still greater grievance to the lot-owners and quite destroy the privacy of and the right to

fence their holdings. The maintenance of this first road is not necessary to the enjoyment of the mine, and the ways of access substituted by the Crown are fairly available, and will every year become more and more improved with the growth and needs of the inhabitants. I cannot conclude from the circumstances of the case and the method of user that this road should be continued to the general detriment. So far as this phase of the action is concerned, I think the plaintiffs fail, and the injunction should be removed which forbade the lot-owners protecting their property by fences and other barriers.

To refer briefly again to dates, the townsites and lots and streets were defined upon the ground and in recorded plans before the irregular road was made by the plaintiffs. O. L. S. Clark made an authorised survey of townsite, marking lots and streets, in October, 1905, which was filed of record in the Land Titles office on the 29th January, 1906, before the way in question was begun. This was done at the instance of the Temiskaming and Northern Ontario Railway Commissioners with a view to the sale of the lots because of the anxiety and urgency of people to settle in that place. On the 19th January, 1906, an order in council vested the townsite in the Commission as delineated in plan made by Mr. Surveyor Clark of the 26th September, 1905, of record in the Department of Mines. And this order in council, recorded in the Land Titles office at North Bay on the 29th January, 1906, is the registered basis of all the surface land titles and streets in the townsites in question. The Clark plan first recorded was in some particular incorrect, and it was superseded by a subsequent plan of his, recorded on the 7th April, 1906. In both, the lots and streets are practically in the same place on the ground. Clark is not called as a witness, but the evidence is that he changed his plan and work before the sale of the lots in August, 1905, and the lots and streets were re-staked accordingly at the time of the sale. This is the recollection of Mr. Smith, then the Chairman of the Commission. The result is that public streets dedicated by the Crown existed before the plaintiffs had made their own way across the townsite. The evidence of the working conditions having been complied with by Trethewey, gives the date of performance as between the 1st July and the 23rd September, 1905. As far as I can make out from the evidence and papers, all these dates are correct, and they demonstrate that the

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plaintiffs' work in making this road was all done after they were well aware of the townsite and the lots and streets being laid out.

They afford additional reason for negating the claim in derogation of the rights of the defendants and others of the inhabitants.

Next comes the question, of more substance and financial importance, regarding the enjoyment of the mining rights as affecting the street and lot-owners. First as to the streets, I think the Legislature has spoken by enactments which bind the plaintiffs. Earlier statutes as to the Temiskaming and Northern Ontario Railway are repealed and substituted provisions supplied by the Act of 1907, 7 Edw. VII. ch. 18, and in particular secs. 23 and 24. Before this statute, the rights of the mining owner would have to be exercised with due regard to the rights of the public interested in the streets over which the mining rights existed. The Crown is the custodian of the public rights, and may well legislate to define and regulate the way in which mining operations shall be conducted on the highways. That is the purpose of the Act—regulating, but in no way extinguishing, the rights of the plaintiffs. Section 20 of the Act of 1907 is *in pari materia* with sec. 3 of the Act of 1904, under which the townsite of Cobalt became vested by order in council in the Railway Commission. I read secs. 23 and 24 as applying to townsites existing at the date of the Act whereon and whereunder mining rights had been reserved. And then the obligation is cast upon the grantee of such rights to submit plans with specifications and details, as provided by the enactment, in order to obtain the approval of the engineer of the municipality to the proposed operations on the street. That, binding the plaintiffs, as I think, disentitles them to maintain their injunction against the Town of Cobalt, for they have failed to take these preliminary steps before entering upon the roadway.

Different considerations arise as to the private lot-owners, for, as to them, there has been no regulation provided or agreed upon, and the dispute must turn upon the terms of the patent, which is prior to the title of the defendants, and subject to which they obtained their conveyances of the surface rights.

The grant to the plaintiffs' predecessors is of mining claim J.B. 6 in fee simple, and expressed as the mines, minerals, and mining rights in, upon, and under all that parcel of land, etc., etc., being 40 acres situated in the township of Coleman, within the limits of

the town plot of Cobalt, as shewn on plan of survey by O. L. Surveyor W. J. Blair, dated the 26th August, 1904—reserving 5 per cent. of the acreage for roads and the right to lay out the same where the Crown or its officers may deem necessary. It may be noted that the patentee takes subject to the right of the Crown to lay out roads on the property granted, so that the patentee's rights are deemed subsidiary to those of the public as regards roads over the property.

The prepositions used, "in, upon, and under," mark more than (as was argued) subterranean rights—"in and upon" would carry rights on the surface where minerals exist.

The patent issued under R.S.O. 1897, ch. 36, of which sec. 2 defines various important words: *e.g.*, "mining," shall include any mode of working whereby the soil or earth may be disturbed, removed, . . . or otherwise dealt with for the purpose of obtaining any mineral therefrom, whether the same may have been previously disturbed or not.

"Mining rights" shall mean the ores, mines, and minerals on or under any land where the same are dealt with separately from the surface of the land.

"Surface rights" shall mean lands granted for agricultural or other purposes, and in respect of which the minerals thereupon or under the surface thereof are reserved to the Crown. This will, of course, extend to the case of patentees to whom the Crown has granted the mining rights.

By sec. 32 of the Revised Statute, the first discoverer is entitled to a free grant of one location of 40 acres (\$60 was paid for this location). "Surface rights and mining rights" are dealt with in a group of sections, 41-43, but do not much help at present. Section 41 provides for the surface owner getting the ores and minerals, unless a patent has been previously applied for by the first discoverer of valuable ore in or upon the premises, in which case he shall have the priority. The Crown appears to have acted on this principle in regard to the respective titles of the plaintiffs and defendants. Section 42 provides for surface rights having been granted, leased, or located, and a patent of mining rights shall thereafter be granted in respect of the same land, in which case compensation must be made for injury or damage to the surface rights, *i.e.*, occasioned by the working of the mining rights. That section is invoked by the

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defendants, who claim compensation if the surface is disturbed by the plaintiffs, but it is to me very clear that the section does not apply, and I negative any such claim. It would only arise where the surface rights have first been granted, and subsequently the mining rights. The reverse is the order as to these litigants. A like provision is in force in Nova Scotia, which was under consideration in *Palgrave Gold Mining Co. v. McMillan*, [1892] A.C. 460.

Section 43 casts negative light on the situation. It provides that no person shall have the right of entry *as prospector or explorer* upon the surface rights of that portion of any lot used as a garden, etc., or pleasure ground, or upon which crops that may be damaged by such entry are growing . . . or any dwelling-house, out-house, etc., unless with the written consent of the owner, *i.e.*, of the surface rights. It might be a fair inference from this that, in the case of the prior patentee of mining rights, he would have a right of entry upon the surface rights of one who was subsequent in his acquisition of title thereto. Beyond these sections the statute is silent, and I have to proceed further for the ground of decision.

In British Columbia the mining law provides for the relative rights of the two classes of owners. Crown grants of all minerals underneath the land are there drawn so as to give the grantee certain easements over the surface, *i.e.*, the right to the use and possession of the surface . . . for the purpose of winning and getting from and out of such claim the minerals contained therein, including all operations connected therewith or with the business of mining: *In re Reliance Gold Mining and Milling Co.* (1908), 13 B.C.R. 482.

In the United States the present situation is avoided under the existing state of the law, by which grants for townsites are not allowed upon or over the mineral lands: 27 Cyc., p. 606, note 11; *Deffebach v. Hawke* (1885), 115 U.S. 392.

The language of Lord Chelmsford is pertinent to the plaintiffs' patent. The minerals, he says, are "a species of property which can be made profitable only by removal," and the grant "therefore carries with it as necessarily incident a right to use all proper means for obtaining the minerals, but nothing further:" *Duke of Hamilton v. Graham* (1871), L.R. 2 Sc. App. 166, 171, 172. And, pursuing the same theme in *Ramsay v. Blair* (1876), 1 App. Cas. 701, 703, the same Judge says: "Upon a grant or reservation of minerals,

primâ facie it must be presumed that the minerals are to be enjoyed, and therefore that a power to get them must also be granted, or reserved, as a necessary incident. . . . This power to dig would of course be futile unless it involved the right of bringing to the surface."

On the same lines and based on English authorities has been laid down more fully the law in New York. I may cite the well-considered case of *Marvin v. Brewster* (1874), 55 N.Y. 538, which holds that the right to mine carries a right to penetrate to the minerals through the surface for the purpose of digging out and removing them, and to do so in such manner as is convenient and advantageous to the owner of the right, so that the surface is not wholly destroyed. The right is to sink a shaft vertically or drive a way horizontally, or to do both in different places, so as to reach and remove the minerals, with the restriction that what is done must be necessary for the reasonable use and enjoyment of the minerals.

The silver ore in this locality rests in vertical veins and not in horizontal strata; in many cases coming up to or close to the surface. The terms of the patent and language of the Mining Act agree in giving the owner of the mines the property in the minerals which are upon, in, or under the surface. When the ore crops up through the soil, it forms part of the surface, and is covered by the patent as minerals. It is incident to the enjoyment of the patent that there be the right to enter upon the lot to search or prospect for minerals, and in so doing to uncover or discover them by the removal of the soil. This is, of course, a disturbance of the surface, but it is an incident or easement which necessarily appertains to the mining rights of the plaintiffs. There is, I take it, the power to get out the minerals either by open or by subterranean working. In one case the opening may need to be surrounded by fencing or other safeguard, and in the other to be supported by under-propping to maintain the surface as in its natural state: *In re Williams v. Groucott* (1863), 4 B. & S. 149; and *Locker-Lampson v. Staveley Coal and Iron Co.* (1908), 25 Times L.R. 136. There may be cases fraught with difficulty between these two extremes, where the surface is so thin over the vein that it is a mere skin of little or no value, or where it is not of sufficient depth or substance to admit of effective support. These cases it is not now needful to deal

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with, and, indeed, each may have to be decided according to its special circumstances. The parties may find it to be to their mutual advantage to come to terms upon some fair workable system; remembering a suggestion that, in a case of conflicting interests, it is better to have a *modus vivendi* than to be in a continual attitude of *qui vive*.

I think the result of the cases is to the effect that, whatever support of the surface is to be supplied, it is only in so far as regards that surface in its natural state, and the right of support does not extend to the burden of buildings or superstructure afterwards erected on the surface.

The plaintiffs are entitled to a declaration, in the words of the British Columbia law, that they are to have the use and possession of the surface for the purpose of winning and getting from and out of the lots over which the mining rights extend the minerals contained therein, or therein including all operations connected therewith or with the business of mining, and the injunction granted is to this extent continued: see *Hayles v. Pease and Partners Limited*, [1899] 1 Ch. 567, 581.

Success being about equally divided, it is best not to give costs to either side.

The defendants appealed from the judgment of Boyd, C., and the plaintiffs cross-appealed.

October 6 and 7, 1909. The appeals and cross-appeals were heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

E. D. Armour, K.C., for the defendants. The defendants are by statute entitled to the exclusive ownership and enjoyment of the surface. Under the Mines Act, R.S.O. 1897, ch. 36, sec. 2, sub-sec. 5, "surface rights" mean "lands granted, leased, or located," and when the lands were sold to the private defendants on the 18th August, 1905, they were "located" within the meaning of sec. 42 of the Act, and the defendants were entitled to be compensated for disturbance, the patent under which the plaintiffs claim having been granted after that date. The technical significance given to "locate" in the Public Lands Act does not apply to the word as used in the Mines Act, and the latter Act is not controlled by the former. At common law, also, the defendants are entitled to

succeed, as the surface rights include the whole inheritance in the land, except the minerals, and a way of necessity to get them if the necessity exists. The case of *In re Reliance Gold Mining and Milling Co.*, 13 E.C.R. 482, cited by the learned trial Judge, does not express the common law on this point. *Sic utere tuo* is the maxim applicable to mine-owners in cases where the minerals and the land are severed, whether by grant, lease, or Act of Parliament: *London and North Western R.W. Co. v. Evans*, [1893] 1 Ch. 16; *Bell v. Love* (1883), 10 Q.B.D. 547; *Bell v. Wilson* (1866), L.R. 1 Ch. 303.

H. H. Collier, K.C., for the plaintiffs. The plaintiffs rest their title upon the patent which was granted on the 9th December, 1905, their rights under which are paramount to those granted by the subsequent order in council upon which the defendants' title is based. No title passed under that order until its registration on the 20th January, 1906: Temiskaming and Northern Ontario Railway Act, 7 Edw. VII. ch. 18, sec. 20. The defendants' lands were not "located" within the meaning of sec. 42 of the Mines Act, for, when that Act was passed, the word had a well-defined statutory meaning, as appears from secs. 17 and 18 of the Public Lands Act, and from the Free Grants and Homesteads Act, secs. 5, 7, and 8. The following cases were referred to: *Batten Pooll v. Kennedy*, [1907] 1 Ch. 256; *Duke of Hamilton v. Graham*, L.R. 2 Sc. App. 166; *Pearson v. Spencer* (1863), 3 B. & S. 761; *Walsh v. Secretary of State for India* (1863), 10 H.L.C. 367, at p. 386; *Smithies v. National Association of Operative Plasterers*, [1909] 1 K.B. 310, 319.

Armour, in reply.

April 9, 1910. Moss, C.J.O.:—Appeals by the respective defendants from the judgment of the Chancellor, after trial of these actions, in so far as it was adverse to them; and cross-appeal by the plaintiffs against so much of the judgment as denied them further relief.

The circumstances giving rise to the litigation are set forth at length in the learned Chancellor's judgment, and they need not be repeated.

It is sufficient to state that the plaintiffs are, by virtue of letters patent from the Crown, dated the 9th December, 1905, and several mesne conveyances, the owners in fee simple of the mines, minerals,

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and mining rights in, upon, and under the whole of a parcel of land composed of and known as mining claim J.B. 6 in the township of Coleman, containing 40 acres; and also that by virtue of a deed of transfer from the Temiskaming and Northern Ontario Railway Commissioners, dated the 2nd May, 1906, and several mesne conveyances, they are the owners in fee simple of a portion of the land known as mining claim J.B. 6, described as lot number 42 on a plan of the townsite of Cobalt, and said to contain an area of between 20 and 25 acres of the 40 acres comprising mining claim J.B. 6.

So far, therefore, as lot No. 42 is concerned, the plaintiffs are the proprietors in fee of the land and of all mines and minerals and mining and surface rights connected with it. Mining claim J.B. 6 is now part of the townsite of the town of Cobalt, as shewn on a plan of the townsite made by L. O. Clark, an Ontario Land Surveyor.

The plaintiffs' plant, mining works, and buildings are situated upon the part of J.B. 6 known as No. 42, and in order to gain access with vehicles and teams to and from this portion of their property to the remaining parts of claim J.B. 6, and to and from Cobalt railway station, they constructed a roadway which they used for the purpose of bringing in machinery, fuel, supplies, and other necessary freight, and carrying away from their works the ores and product of their mining operations. The evidence clearly establishes that, at the time of the commencement of the actions, and up to the time of the trial, this road was the only practicable route, and that an alley-way or lane shewn on the plan, and said to be 15 feet in width, put forward by the defendants as a practicable and sufficient route for the purposes of the plaintiffs' business, was wholly inefficient and inadequate as a substitute for the plaintiffs' roadway.

The defendants having interfered with the plaintiffs' user of their roadway, by the erection of a fence and building and in other ways, and having also interfered with the plaintiffs in and prevented them from searching for minerals upon portions of claim J.B. 6 not comprised in lot No. 42, the plaintiffs brought these actions. The defendants claimed the right to prevent the plaintiffs' further use of the roadway in so far as it crossed townsite lots, and to exclude the plaintiffs from searching for minerals in or upon the streets or townsite lots as laid out on claim J.B. 6. And—as the learned Chancellor states—at the trial two questions were presented for

decision: (1) as to the right of the plaintiffs to use the roadway from their now worked mines; and (2) as to the plaintiffs' right to search for minerals; such user and search affecting the streets in the town of Cobalt and certain townsite lots to which the individual defendants claimed title.

The Chancellor held with the defendants that the plaintiffs were no longer entitled to use their roadway over the townsite lots, and that, as regarded the right to search for minerals in the streets, it was subject to the provisions of secs. 23 and 24 of the Act 7 Edw. VII. ch. 18, prescribing certain preliminary conditions to be observed by mine-owners, and that the plaintiffs, having failed to observe them, were not entitled to relief in respect of the acts of prevention complained of. He held, however, that the plaintiffs were entitled to carry on their mining operations in, upon, or under the streets and highways of the town, subject to the provisions of the 23rd and 24th sections of the Act; and also that they were entitled to the use and possession of the surface of the townsite lots owned or claimed by the individual defendants, so far as required to enable them to prosecute their mining rights and privileges. And the judgment restrained the defendants from interfering with the plaintiffs in their use of the streets and lots to the extent declared.

Neither party being satisfied, and each claiming the full extent of their asserted legal rights, the same questions are again presented for consideration.

Apart from the effect of the statutory provisions already referred to, the questions seem to resolve themselves into an inquiry into the extent of the rights of a grantee or owner of mines, minerals, and mining rights in, upon, and under lands, as against the grantee or owner of the surface whose title has been acquired subsequently to that of the owner of the mines, etc. Having regard to the course of dealing and the order of conveyancing, if it may be called such, there is no reason to think that the title of the individual defendants is not subject to all the rights which are expressed to be granted to the plaintiffs by the letters patent of the 15th December, 1905. It appears clear that sec. 42 of the Revised Statute (R.S.O. 1897, ch. 36) is not applicable, for the reasons pointed out by the Chancellor, and therefore these defendants have no status to claim compensation for anything properly done by the plaintiffs in the

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exercise of their rights. This is a case in which the ores, mines, and minerals were dealt with separately from the surface of the land, but such dealing was before and not after the surface rights had been granted, leased, or located in the manner contemplated by sec. 42. It is conceded that they had not been granted or leased, but it is said they were located. But in connection with public lands the term "located" has a well-known meaning, and it is not to be presumed that it was intended to be used in sec. 42 in a different sense. It is clear that, in its ordinary sense, it would not comprise such dealings with these lands as took place under the direction of the Department or the Commissioners of the Temiskaming and Northern Ontario Railway prior to the issue of the grant to the plaintiffs. The case of the defendants, corporate and individual, must rest upon whatever rights remained to be acquired and were acquired after the plaintiffs' grant, aided, however, as to the former, by any subsequent legislative enactments by which the plaintiffs' rights may be affected. What, then, are the plaintiffs' rights?

The learned Chancellor has held that they may no longer use the roadway across the surface of the lots in question, resting his view chiefly upon the fact of the streets and lots in the townsite having been delineated and shewn on a plan before the construction of the plaintiffs' roadway. It is not questioned that the plan was not properly recorded until after the issue of the letters patent to the plaintiffs' predecessors in title.

The grant thereby made unquestionably carried with it everything that was reasonably necessary to the proper enjoyment and use of the thing granted, including, of course, such convenient way or ways, or means of ingress and egress, as were required. The delineation on a plan of courses of streets for the use of the town-dwellers could not conclude the question of what was reasonable as a way or means of access to the plaintiffs' mining works, which had been in operation before the preparation or recording of the plan.

Upon the evidence, the plaintiffs appear to have decided upon their present roadway after due consideration of the topography and the engineering difficulties to be overcome.

It appears to be at the present the only practicable way by which the plaintiffs can transport whatever is required for the prosecution of their mining operations and the due and proper working of their mines, including the carrying away of the ores, metals, and

other products. The defendants have shewn no good reason for interfering, at the present time and under present conditions, with the reasonable user by the plaintiffs of the roadway for their necessary purposes. And to the extent of enjoining the defendants from interfering with and obstructing the way, the plaintiffs' cross-appeal should be allowed.

In support of their claim to begin and carry on mining operations upon the streets without the hindrance of the defendant corporation, the plaintiffs contend that the provisions of secs. 23 and 24 of the Act 7 Edw. VII. ch. 18 do not apply to them or affect their rights. It is said that to give effect to them as against the plaintiffs would be to deprive them of vested rights. The authority of the Legislature to do so, if it deems it proper and right, must be conceded. The real question is, what has been intended and effected by the legislation?

Section 23 seems to be intended mainly for the protection of the title and rights of owners of mines, minerals, and mining rights, and to be declaratory of the existing law in that respect. Section 24 is intended to regulate the manner in which owners shall exercise their rights, and in that sense is restrictive. But that alone is not sufficient for concluding that it should not apply to owners who acquired their titles before the passing of the enactment. The obvious policy is, not to prevent the use and enjoyment of the mining rights, but to so order them in the public interest that the highways and those travelling in and upon them may be kept secure and free from danger owing to mining operations being carried on. And the language of the enactment may well be read as applying to conditions as they arise, and as so far affecting all owners of mining rights such as the plaintiffs have in the lands in question here. The plaintiffs' cross-appeal as to this part of the judgment fails.

The defendants' appeal fails, for the reasons given by the learned Chancellor.

The rights of the individual defendants as owners of the surface rights have been already touched upon in dealing with their claim to be entitled to compensation. The conclusion on that branch of their case is substantially a determination of their other contentions as against the plaintiffs' rights in, upon, and under their respective lots. There is nothing to shew that the plaintiffs were

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doing anything upon the defendants' lots to justify the acts of obstruction and prevention on their part of which the plaintiffs complained; and the learned Chancellor so found.

The result is that the defendants' appeal should be dismissed and the plaintiffs' cross-appeal allowed to the extent indicated, with costs to the plaintiffs.

MEREDITH, J.A.:—The respective rights of the parties in such a case as this seem to me to be so plain and reasonable that litigation over them could not but be avoided if each would have some regard for the other's rights and not concentrate all thought and energy upon his own interests and gain only.

The plaintiffs are the owners of all the mining rights in the lands; the defendants who have acquired any title to them acquired it with a knowledge of, and expressly subject to, such mining rights.

The mining rights include all such things as are reasonably necessary in seeking minerals and in working mines; but must be exercised so as to do as little injury as reasonably can be to the land, and consequently the defendants' interests; and such rights include all reasonably necessary ways.

These views are, I think, quite in accord with those expressed, and intended to be acted upon, by the trial Judge: I differ from him only in the application of them in one respect. He thought that the allowances for public roads afforded a sufficient means of ingress, and egress for the plaintiffs: I find that, in their present state, they do not, and, therefore, that the plaintiffs are entitled to continue to use the one way in and out, which they made and have always used, until the public ways are made fit for traffic—at least as reasonably fit as the present road.

In regard to the legislation in question, no one, who has a knowledge of the circumstances under which it was enacted, as we all have, can have any doubt that it was intended to apply to such ways as those in question; and the words used are wide enough to include them; though, having regard to the general rules respecting the interpretation of statutes, the intention to make this enactment retrospective should have been more clearly expressed. To adjudge it prospective only would in all probability be but wasted adjudication; to be promptly followed by legislation declaring, and enacting, that it was and shall be retrospective.

I would dismiss the defendants' appeal; and allow that of the plaintiffs, to the extent before indicated.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

[BRITTON, J.]

FOWELL v. GRAFTON.

Negligence—Sale of Air-gun to Minor—Injury to Person—Duty—Liability—Criminal Code, sec. 119.

The defendants, who sold an air-gun to a boy of thirteen, were held liable to the plaintiff, who was injured by shot fired from the gun in the hands of the boy, for their negligence in selling it to a minor under sixteen: Criminal Code, sec. 119.

Dixon v. Bell (1816), 5 M. & S. 198, followed.

AN action for damages for negligence resulting in personal injury to the plaintiff, in the circumstances stated in the judgment.

March 22. The action was tried before BRITTON, J., with a jury, at Hamilton.

J. L. Counsell, for the plaintiff.

G. Lynch-Staunton, K.C., for the defendants.

April 11. BRITTON, J.:—The defendants are merchants doing business in Hamilton, and in certain cases issue premium tickets or coupons to purchasers upon sales of goods. On the 6th October last, in exchange for 25 of these tickets, the defendants gave or sold or placed in the hands of one John O'Connor, a lad of only thirteen years of age, an air-gun. The defendants gave no ammunition with the gun, but the boy got ammunition elsewhere. It was easily obtained. Any small shot would serve the purpose. O'Connor took the gun and ammunition to his home. He resided with his parents in Wood street, nearly opposite to the residence of the plaintiff. The father did not know that the boy had the gun, but his mother did know of it, and did not take it from him. On the 7th October the boy, standing at or near his own door, saw a bird in the street, and fired at it, apparently shooting wide of the mark, for the shot struck the left eye of the plaintiff, so injuring it that she has completely lost the use of it. The plaintiff was standing in the doorway of her residence on the opposite side of the street.

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At the trial the defendants' counsel moved for dismissal of the action, on the ground that there was no evidence of actionable negligence of the defendants. I reserved decision, and left the question of negligence to the jury, subject to this being a case upon the facts which should be submitted to them. The defendants did not call any witnesses or put in any evidence, and no objection was taken to my charge. The objection was to the case going to the jury at all. The jury found the defendants guilty of negligence, and assessed the damages at \$800.

I am of opinion that there was evidence to go to the jury. It is laid down in *Dixon v. Bell* (1816), 5 M. & S. 198, that "the law requires of persons having in their custody instruments of danger, that they should keep them with the utmost care." In that case the defendant had a loaded gun which he kept at his boarding-house. The plaintiff was also a boarder at the same place. The defendant sent a girl of about thirteen or fourteen for the gun, desiring the boarding-house keeper to give the gun to the girl, but to take the priming out. The keeper did take the priming out, told the girl so, and handed the gun to her. She put the gun in the kitchen, resting on the butt. Soon afterwards she took it up again, presenting it in play at the plaintiff's son, a child of eight, saying she would shoot him. She drew the trigger, and the gun went off, striking out the right eye of the child. The defendant was held liable. Lord Ellenborough, C.J., said: "The defendant might and ought to have gone farther; it was incumbent on him, who, by charging the gun, had made it capable of doing mischief, to render it safe and innoxious."

It is common knowledge that an air-gun in the hands of a child is "capable of doing mischief."

It was because of this, I think, that sec. 119 of the Criminal Code was enacted. By that section it is an offence for any person to sell or give any air-gun, or any ammunition therefor, to a minor under the age of sixteen years, unless it is established to the satisfaction of the justice before whom the person is charged that he used reasonable diligence in endeavouring to ascertain the age of the minor before making such sale or gift, and that he had good reason to believe that such minor was not under the age of sixteen.

In this case there was no inquiry made as to the boy's age, and on the trial there was no explanation by the defendants. What

actually happened in due course after the boy got the air-gun was one of the things that might reasonably be expected from its use by a boy or person under the age of sixteen.

In my opinion, there was owed to the public by the defendants a duty not to sell or give to a minor under the age of sixteen an air-gun for which ammunition could easily be obtained. The plaintiff, as one of the public, is entitled to the protection intended to be given by the enactment mentioned. Apart from the knowledge that may be imputed to any business man of the danger from the use of an air-gun in the hands of a minor, there is the law referred to. There was evidence upon which a jury could find that these defendants might reasonably have anticipated injury as a consequence of permitting the boy O'Connor to have for his use the air-gun. The air-gun was obtained from the defendants' store in Hamilton. The boy went to the defendants' office and asked where he could get an air-gun for these tickets; he was told to go upstairs, went upstairs, and got the gun from persons on duty there for the defendants. No directions were given with it, and no questions asked.

The question of negligence is always in a sense one of degree. There is a duty to a stranger owed by a person using dangerous substances, or dangerous weapons, not to leave them where they may be used by persons ignorant of the danger: see *Makins v. Piggott* (1898), 29 S.C.R. 188.

There was, in my opinion, such evidence of negligence that the case could not properly have been withdrawn from the jury; so I direct judgment for the plaintiff for \$800, with costs.

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April 13.

Will—Construction—Devise to Widow during Widowhood with Devise over in Event of Remarriage—Death without Remarriage—Vested Remainder Taking Effect in Possession on Death—Remainderman Dying Intestate—Distribution of Estate—Half-brother.

The testator devised land to his wife, to have and to hold for her personal benefit, so long as she "shall remain my widow," and, in the event of her remarrying, to his two daughters; and directed that the daughters should receive their support from the wife out of the property willed to her. Five years after the death of the testator the widow died without having married again:—

Held, that the devise over was not dependent on the contingency of the widow's marrying again, but took effect upon her death.

The devise to the widow, though not in terms for life if she should so long continue a widow, was in effect the same.

Underhill v. Roden (1876), 2 Ch.D. 494, and other cases to the same effect, followed.

Pile v. Salter (1832), 5 Sim. 411, not followed.

The two daughters took under the will a vested remainder in the land, to take effect in possession upon the marriage or death of the wife.

One of the daughters having died intestate and without issue, her half-brother was *held* entitled as one of her next of kin to an equal share with her sister in her estate, under the Devolution of Estates Act.

MOTION by Henry Branton, under Con. Rule 938, for an order determining certain questions which had arisen on the will of Thomas Branton, deceased, dated the 26th January, 1874. The facts are stated in the judgment.

April 11. The motion was heard by MEREDITH, C.J.C.P., in the Weekly Court.

G. H. Kilmer, K.C., for the applicant.

E. G. Long, for the executors and other persons interested under the will.

April 13. MEREDITH, C.J.:—The testator, who died on the 17th January, 1875, by his will devised to his wife Elizabeth lots numbers 6 and 7 on the Davenport road, "to have and to hold for her personal benefit so long as the said Elizabeth Branton shall remain my widow, and, in the event of the said Elizabeth Branton re-marrying, the said lots, houses, and appurtenances, with all the privileges thereof, to become the property of my children, Fanny Lydia Branton and Mary Johnson Branton, to have and to hold as theirs without let or hindrance;" and by the paragraph which follows this devise the

testator provided: "Also that the said children shall receive their support, clothing, and education from the said Elizabeth Branton out of or from the said property willed by me to the said Elizabeth Branton."

The testator left surviving him these two daughters, issue of his marriage with Elizabeth Branton, and the applicant, his only child by a previous marriage.

Elizabeth Branton died in the year 1880, without having married again.

Mary Johnson Branton died on the 18th February, 1904, intestate and without ever having married, and the Toronto General Trusts Corporation were on the 29th June, 1904, appointed administrators of her property.

The questions for decision are:—

1. Whether or not, in the events that happened, the gift over contained in the will of the testator took effect?

2. What share or interest in the Davenport road lots is the applicant entitled to?

According to the statement of Mr. Jarman, the established rule of construction where a testator makes a devise to his widow for life, if she shall so long continue a widow, and if she shall marry, then over, is "that the devise over is not dependent on the contingency of the widow's marrying again, but takes effect, at all events, on the determination of her estate, whether by marriage or death:" Jarman on Wills, 5th ed., p. 759.

Mr. Theobald's statement is to the same effect: "A devise to A. for life if she should not marry again, but if she should, to B., will be construed as a devise to A. for life or till marriage:" Theobald on Wills, Canadian ed., p. 567. See also pp. 575-7.

The authorities cited by these learned authors fully support their statements as to the rule of construction established by the cases.

It is unnecessary to go through the long list of these cases, beginning with *Luxford v. Cheeke* (1684), 3 Lev. 125, reported also, *sub nom. Brown v. Cutler* (1682), 2 Shower 152, Sir T. Raymond 427, but a few of the modern ones in which the rule has been recognised and applied may be mentioned.

In *Browne v. Hammond* (1858), Johns. 210, Vice-Chancellor Sir W. Page Wood said: "I am concluded by the authorities,

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which have determined that a devise or bequest over, though in terms made upon the marriage of the donee of the preceding estate, is to be extended by implication, so as to take effect on the termination of that estate by death:" p. 214.

In *Eaton v. Hewitt* (1863), 2 Dr. & Sm. 184, Vice-Chancellor Kindersley, in applying the rule, spoke of it as "a rule now well established, that where a testator gives to a woman a life interest, if she so long remains unmarried, and then directs that in the event of her marrying the property shall go over to another, although according to the strict language, the gift over is expressed only to take effect in the event of the marriage of the tenant for life, the gift over is held to take effect, even through the tenant for life does not marry:" p. 192; and the rule was again applied by the same learned Judge in *Wardroper v. Cutfield* (1864), 10 L.T.N.S. 19.

The Master of the Rolls (Jessel) quoted with approval the passages which I have quoted from the reports of the first two of these three cases, and applied the rule in *Underhill v. Roden* (1876), 2 Ch.D. 494.

The rule was also applied by North, J., in *In re Tredwell*, [1891] 2 Ch. 640, and, though the Court of Appeal did not agree with his view as to the application of it to the will he had to construe, the rule was recognised as a well-established rule of construction. The rule or the principle of it was also applied in *Meeds v. Wood* (1854), 19 Beav. 215; *Eastwood v. Lockwood* (1867), L.R. 3 Eq. 487; *In re Martin* (1885), 54 L.J. Ch. 1071; *In re Dear* (1889), 58 L.J.Ch. 659; and *In re Cane* (1891), 63 L.T.N.S. 746.

Pile v. Salter (1832), 5 Sim. 411, cited by Mr. Kilmer, was the case of a bequest by a husband of certain moneys and property to his wife in trust for her so long as she should remain a widow, but upon her marrying again he bequeathed to her one-third of his property not otherwise disposed of, and the remaining two-thirds he bequeathed to his nieces. The widow died without having married again, and the question was whether the gift over took effect. The Vice-Chancellor (Shadwell) held that it did not, and that on her death there was an intestacy. The Vice-Chancellor appears to have been influenced in coming to that conclusion by what he thought would be the absurdity of giving to the widow one-third of the property in the event of her death, which would have been the result if the rule of construction to which reference

has been made had been applied; and Vice-Chancellor Sir W. Page Wood refers to this in *Browne v. Hammond* and says that the case seems to have been determined on its own special circumstances.

Pile v. Salter was, however, disapproved by the Master of the Rolls in *Underhill v. Roden*, and was not followed by Stirling, J., in *Scarborough v. Scarborough* (1888), 58 L.T.N.S. 851; and if, as they treated it, it is inconsistent with the other cases to which reference has been made, it should not, I think, be followed.

Burgess v. Burrows (1871), 21 C.P. 426, is the only reported case in this Province which deals with the question which I have found, and in it the rule is treated as an established rule of construction.

It was argued by Mr. Kilmer that the rule ought not to be applied in the case at bar, because the devise to the widow is not in terms for life if she should so long continue a widow, but I do not agree with that contention. The effect of the devise is precisely the same as if it had been expressed to be for life if she should so long continue a widow: *In re Carne's Settled Estates*, [1899] 1 Ch. 324; *National Trust Co. v. Shore* (1908), 16 O.L.R. 177.

There must be a declaration that the two daughters took under the will a vested remainder in the land, to take effect in possession upon the marriage or death of the wife.

Upon the death of the daughter Mary Elizabeth Branton intestate and without issue, her undivided one-half of the land became, under the provisions of the Devolution of Estates Act, distributable in like manner as personal property, and the applicant, though but a half-brother, is entitled as one of her next of kin to share equally with the other next of kin, the surviving sister, and there will be a declaration accordingly.

The costs of the application will be paid out of the estate in the usual way.

It will be noticed that the daughter Mary is called Mary Johnson in the will, and Mary Elizabeth in the letters of administration granted to the Toronto General Trusts Corporation. There is no explanation of this, except that Mr. Langmuir in his affidavit speaks of her as Mary Elizabeth Branton, otherwise known as Mary Johnson Branton. This is not a sufficient explanation, and a satisfactory one must be made before the order issues.

Meredith, C.J.

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RE

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[DIVISIONAL COURT.]

D. C.

STANDARD CONSTRUCTION CO. v. WALLBERG.

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March 17.
 April 3.
 April 16.

Writ of Summons—Service out of Ontario—Order Permitting—Con. Rule 162—Conditional Appearance—Con. Rule 173—Discretion—Appeal—Jurisdiction of Court over Foreigners.

The power, under Con. Rule 173, to allow a conditional appearance should be exercised only where it is doubtful whether the plaintiff can bring himself within Con. Rule 162, by reason of the facts being in issue. Where a case is shewn within that Rule, there is no reason why a conditional appearance should be entered.

A defendant served with the writ of summons out of the jurisdiction under an order permitting such service, and not moving to set aside the service, was refused leave to enter a conditional appearance.

Orders of the Master in Chambers and FALCONBRIDGE, C.J.K.B., affirmed.

Per BOYD, C., that the orders were discretionary, and the discretion exercised should not be interfered with.

Semble, *per* MIDDLETON, J., that a case was shewn within the provisions of Con. Rule 162; and remarks upon the jurisdiction of Ontario Courts in actions against foreigners, and as to the discretion to be exercised in permitting service out of Ontario.

MOTION by the defendant Wallberg, under Con. Rule 173, to be allowed to enter a conditional appearance, the writ of summons having been served upon him in the Province of Quebec, under an order permitting such service.*

March 16. The motion was heard by the Master in Chambers.

M. Lockhart Gordon, for the applicant.

G. F. McFarland, for the plaintiffs.

March 17. THE MASTER:—The action is for cost of erecting a transmission line in the mining districts. Wallberg resides in Montreal, and is sued as jointly liable for the work in question. He wishes

* Con. Rule 173. A conditional appearance may be entered by leave of the Court or a Judge.

Con. Rule 162—(1) Service out of Ontario of a writ . . . may be allowed by the Court or a Judge wherever:—

(e) The action is founded on a breach within Ontario of a contract wherever made, which is to be performed within Ontario or on a tort committed therein;

(h) Service may also be allowed where the action is for any other matter and it appears to the satisfaction of the Court or a Judge that the plaintiff has a good cause of action against the defendant upon a contract or judgment, and that the defendant has assets in Ontario of the value of \$200 at least, which may be rendered liable for the satisfaction of the judgment, in case the plaintiff should recover judgment in the action; but in such case if the defendant does not appear, the Court or a Judge shall give directions from time to time as to the manner and conditions of proceeding in the action, and shall require the plaintiff, before obtaining judgment, to prove his claim, before a Judge or jury or in such manner as may seem proper.

to dispute the jurisdiction of the Court, but does not move to set aside the service and order for the issue of a concurrent writ of summons.

I do not see how this can be done. If Wallberg is jointly liable, then he is subject to the jurisdiction, as was said in *Comber v. Leyland*, [1898] A.C. 524, 527, by Lord Halsbury, L.C., if he comes under either clause (e) or (h) of Con. Rule 162 (1). If he is really not liable, he need not appear if he has no assets in the Province. Certainly, if he is not liable, the action as against him will fail. Even if a judgment is recovered against him, he may be able to avail himself of the decision cited by Mr. Gordon of *Emanuel v. Symon*, [1908] 1 K.B. 302; that will depend upon whether the plaintiffs have to take action in Quebec, and upon what the law there may be on this question. I note that clause (h) of Con. Rule 162 (1) is not in the corresponding English Order.

I assume that the defendant Wallberg is satisfied that he could not have the order set aside; if he wishes to try this, he can do so.

The motion must be dismissed with costs to the plaintiffs in any event.

The defendant Wallberg appealed from the Master's order.

March 29. The appeal was heard by FALCONBRIDGE, C.J.K.B., in Chambers.

The same counsel appeared.

April 3. FALCONBRIDGE, C.J.:—I am not prepared to hold that the Master is wrong, nor to hold that the Judges have enacted, and the Legislature sanctioned, a Rule which is *ultra vires*. A considerable portion of the argument of the appellant's counsel might, I think, be more appropriately urged if the plaintiffs were seeking in a Quebec Court to enforce a judgment obtained here in this proceeding. If the appellant is not satisfied, I think it is probable that he will get leave to appeal.

Appeal dismissed with costs to the plaintiffs in any event.

April 5. Leave to appeal to a Divisional Court was granted by SUTHERLAND, J., in Chambers.

April 15. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

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M. Lockhart Gordon, for the appellant. It is submitted that an Ontario Court has no jurisdiction over the defendant, who resides in Montreal, and he desires to set this up as a defence. If he enters an appearance, he will be attorning to the jurisdiction. As to Con. Rule 162 (1) (*h*), its constitutionality is open to question. The English cases are not applicable here, as the Imperial Parliament has plenary jurisdiction, which is not possessed by the Ontario Legislature. The following authorities were referred to: *In re Busfield*, *Whaley v. Busfield* (1886), 32 Ch. D. 123, especially at p. 130; Dicey's Conflict of Laws, 2nd ed., p. 374; *Ex p. Blain*, *In re Sawers* (1879), 12 Ch. D. 522; *Cooke v. Charles A. Vogeler Co.*, [1901] A.C. 102; Bailey on Jurisdiction, p. 236, sec. 221; *Pennoyer v. Neff* (1877), 95 U.S. 714, at p. 741; *Freeman v. Alderson* (1886), 119 U.S. 185, at p. 188; *Deacon v. Chadwick* (1901), 1 O.L.R. 346, at p. 352.

G. F. McFarland, for the plaintiffs. I take the preliminary objection that no notice was given by the respondent of any intention to dispute the constitutionality of Con. Rule 162. Its purpose is clear. A creditor should have the assistance of the Court in collecting his just debts. It is true that there must be something to connect the foreigner with the Province, but this defendant, by acquiring assets in Ontario, has attorned to its Courts as to these assets: see *Comber v. Leyland*, [1898] A.C. 524, at p. 527. The English cases cited on behalf of the appellant do not apply at this stage of his case, nor are the bankruptcy cases applicable. The United States decisions do not apply, because their Courts have no such Rule as is here in question. The service of the writ is useless unless the plaintiffs can proceed to judgment. No conditional appearance is necessary, as is pointed out in the judgment of the Master in Chambers. If the Ontario Courts have no jurisdiction over the defendant Wallberg, then let the plaintiffs have judgment by default. The plaintiffs are within clause (*h*) of Rule 162, which is not in the corresponding English Order, and which, it is submitted, is clearly within the powers of the provincial Legislature.

Gordon, in reply.

April 16. MIDDLETON, J.:—A contractual liability is personal, and therefore ambulatory with the person, so that

an Ontario Court has jurisdiction, no matter where the contract was made, or between whom, if service can be effected. Service can be made upon any defendant within Ontario, even though he be a foreigner only temporarily within the jurisdiction. Whether the service can be made out of Ontario is a question which, for Ontario Courts, must be determined by the statutes and statutory Rules in force here. Whether such statutes and Rules are within the principles of international comity is a question which the Courts of Ontario cannot entertain: *Western National Bank of City of New York v. Perez Triana & Co.*, [1891] 1 Q.B. 304. A foreign Court will, no doubt, regard a judgment obtained against a non-resident as entitled to no extra-territorial recognition: *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A.C. 670; *Emanuel v. Symon*, [1908] 1 K.B. 302; *Deacon v. Chadwick*, 1 O.L.R. 346.

But the validity of the judgment in the country of the forum by which it is pronounced is expressly recognised: *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A.C. at p. 684.

It was argued that the English cases could not be applied in Ontario, because, while the Imperial Parliament has plenary jurisdiction, the Legislature of Ontario cannot make laws having any extra-territorial effect. The answer is obvious: the provision has no extra-territorial effect. The Courts of Ontario can only authorise the taking in execution of the defendant's assets within the Province, and the enforcing of civil rights is undoubtedly within the ambit of provincial jurisdiction.

Upon the material there can be no doubt that a case is shewn within the provisions of Con. Rule 162. This being so, there is no reason why a conditional appearance should be entered. The power to allow a conditional appearance should only be exercised where it is doubtful if the plaintiff can bring himself within the Rule by reason of the facts being in issue. Conditional appearance is the modern substitute for the undertaking formerly required of the plaintiff, in cases of doubt, to submit to nonsuit if he fail to establish a case within the Rule.

At first sight, there is no doubt some hardship in a provision which may compel a foreigner to litigate here merely because he possesses some assets within the Province; but it must be borne in mind that the right to serve out of Ontario in cases within

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the Rule is not absolute, but depends upon the exercise of a sound discretion.

Here the applicant, on the scant material, makes no attempt to shew that the Courts of this Province are not the most convenient forum for the adjustment of the dispute. From what was said by his counsel upon the argument, it would seem that the dispute arises out of a contract with respect to work done here; the plaintiffs and his co-defendants are both Ontario companies; the witnesses, or most of them, must reside here; and it cannot be doubted that justice and convenience demand a trial here.

Appeal dismissed. Costs to the plaintiffs in any event.

BOYD, C.:—Rule 173 provides that a conditional appearance may be entered by leave of the Court or a Judge. That imports a discretionary power to grant leave; here it has been refused by the Master in Chambers and again by a Chief Justice on appeal. No sufficient ground is made to appear to induce a further appellate Court to overrule and set aside these orders. On this ground alone, I would affirm the orders in appeal. Costs in the cause in any event to the plaintiffs.

I have read the judgment of my brother Middleton, and also agree with him as to the general law and the facts of this case so far as disclosed.

LATCHFORD, J.:—I agree.

[DIVISIONAL COURT.]

HUBBERT V. HOME BANK OF CANADA.

D. C.

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Promissory Note—Incomplete Instrument—Delivery—Holder in Due Course—Bills of Exchange Act, secs. 31, 32—Leave to Appeal.

Jan. 25
Mar. 22.
April 19.

Where a document in the form of a promissory note, but “wanting” in some “material particular,” is not “delivered in order that it may be converted into” a promissory note, payment cannot be enforced against the maker, even by a holder in due course, under secs. 31 and 32 of the Bills of Exchange Act.

Smith v. Prosser, [1907] 2 K.B. 735, followed.

Judgment of BRITTON, J., affirmed by a Divisional Court.

Leave to appeal to the Court of Appeal refused.

ACTION to recover \$440.50 and interest, in the circumstances set out below.

December 8, 1909. The action was tried before BRITTON, J., without a jury, at Toronto.

J. D. Falconbridge, for the plaintiff.

J. Bicknell, K.C., for the defendants.

January 25. BRITTON, J.:—The plaintiff was a depositor in the savings department of the Home Bank of Canada, Church street branch. On the 4th December, 1908, the plaintiff had to his credit in the said bank a sum exceeding \$440.50.

About the 1st October, 1908, one W. G. Stirton, who represented himself to be an agent for the Canada Life Assurance Co., canvassed the plaintiff and endeavoured to persuade him to make an application for insurance upon his life. The result was that a blank form of promissory note was presented by Stirton and signed by the plaintiff. The form was:—

\$	190
	After date promise
to pay to the order of	
	dollars
at	
value received.	
No.	due.

The plaintiff will not say that the blank form was not in part filled up when he put his name upon it. Writing may have been on it to the extent of the following:—

D. C.	\$440.50.	Oct. 1st, 1908.
1910	December 1st.	After date I promise to pay to
HUBBERT	the order of myself	dollars
v.	at	
HOME BANK.	value received.	
Britton, J.		

That is as far as the plaintiff would say. There was no more, if so much, upon the form, when the plaintiff signed.

There was some question about the plaintiff's signature upon the back of the form. The evidence establishes that both signatures, the one as maker and the one as indorser, are the handwriting of the plaintiff. This paper was left with Stirton upon the understanding and condition that nothing was to be done with it until and unless the plaintiff passed the requisite medical examination by the company's medical man for the purpose. If the plaintiff presented himself for examination and was passed, then the paper signed by the plaintiff, as representing the first premium upon the life assurance, would be taken up. The plaintiff said he would give his cheque for it, and there is no question that the amount to be paid was \$440.50. Almost immediately after the interview between the plaintiff and Stirton, the plaintiff, upon reflection and upon consultation with Mr. Cox, thought he could not afford to carry so large an amount of insurance, and he did not present himself for examination, but, on the contrary, notified Stirton of his intention not to take insurance. The plaintiff omitted to get the paper from Stirton, and Stirton, in fraud of and without the knowledge of the plaintiff, ascertained in some way that the plaintiff had an account with the defendants' bank, and wrote the words "Home Savings Bank, Toronto," upon the paper.

On the 6th October, 1908, Stirton disposed of the paper to the United Empire Bank, for value. Prior to the 4th December, 1908, this paper was handed by the United Empire Bank to the Dominion Bank, for collection. On the 4th December it was presented by the Dominion Bank to the defendants for payment. The defendants stamped their acceptance upon it, charging the amount to the plaintiff against his savings bank deposit account. It went through the clearing-house, and was subsequently paid by the defendants, the money reaching the United Empire Bank.

This case turns upon the application of the Bills of Exchange

Act. Assuming for the moment that this paper, and I will for convenience call it a note, was delivered to Stirton as a note and for the purpose of being used by him as a negotiable instrument, and that it should be issued by him as such, the defence is made out. The United Empire Bank in that case were "holders in due course," within the meaning of sec. 56 of the Canada Bills of Exchange Act. Subject to what may be said as to the defendants' right to use, under any circumstances, without the plaintiff's instructions, his money on deposit in the savings bank branch, the defendants, under sec. 57, have the same rights as the United Empire Bank. That section is as follows:—

"A holder, whether for value or not, who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder."

The plaintiff's money was deposited with the defendants under special terms, conditions, and regulations, fully set out in the plaintiff's pass book; the only ones having any special bearing here are Nos. 6 and 7:—

6. "The bank is authorised to pay to any one presenting a receipt or cheque signed by the depositor or by any one having authority to draw the depositor's money, the amount named in such receipt or cheque and to charge the same to the account of such depositor."

7. "The bank reserves the right to at any time demand notices of withdrawal." (Then follows the length of notice according to amount.)

These do not in terms authorise the payment of a note; the words are "presenting a receipt or cheque;" then the depositor may be charged with "the amount named in such receipt or cheque." The note paid by the defendants was not either receipt or cheque.

In my opinion, the defendants ought not, without special instructions to pay, to have paid this note, and it is contrary to my notion of banking that the defendants should have given another banker information, if they did give such information, that the plaintiff had such an account, or funds to his credit, unless and until the plaintiff's authority was obtained. Notice could be

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demanding by the defendants before payment. They could, of course, waive such notice, and would generally do so in favour of the depositor himself, but it is a different thing when payment of a note or payment under the terms of a contract between the depositor and a third party is asked. The notice could well be invoked as against possible fraud or forgery, or lest for any reason the depositor might desire to contest the third party's claim.

The question, however, is not one of good or bad banking, but what are the defendants' strict rights. The case of *Grissom v. Commercial National Bank* (1889), 87 Tenn. 350, is authority against the defendants, and that case is buttressed by a very considerable amount of American case law. I am not bound to follow that, and I do not, as I am of opinion that, assuming the note to be without taint or suspicion, the defendants may treat the plaintiff's naming the place of payment as authority to pay, even without any general practice. The plaintiff in this case had not on any former occasion made any note payable at the defendants' bank.

Kymer v. Laurie (1849), 18 L.J.Q.B. 218, is authority in favour of the defendants as to their right to pay and charge up against a depositor's savings bank account.

There remains to be disposed of the right of the United Empire Bank, as holders in due course, to recover, upon the facts presented.

The paper in the hands of Stirton must be treated as if "a simple signature on a blank piece of paper" had been handed by the plaintiff to Stirton. Even if the paper had upon it some writing so that it appeared, as I have before mentioned, it would be harmless. No bank would negotiate such paper, and Stirton had no more right, under sec. 31, to fill in the amount in writing and the place of payment, than to wholly fill up a blank piece of paper with only a signature upon it. It had to be filled up before it could be used, and it was filled up by Stirton. It was not delivered to Stirton in order that it might be converted into a note or negotiated as a note.

Sections 31 and 32 of the Canada Bills of Exchange Act are practically the same as sec. 20 of the English Act:—

Section 31: "Where a simple signature on a blank paper is delivered by the signer in order that it may be converted into

a bill, it operates as a *primâ facie* authority to fill it up as a complete bill for any amount, using the signature for that of the drawer or acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *primâ facie* authority to fill up the omission in any way he thinks fit."

Section 32: "In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given: Provided that if any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given."

In *Smith v. Prosser*, [1907] 2 K.B. 735, the language of these two sections has been dealt with and the sections have been construed. In that case the defendant signed his name on two blank lithographed forms of promissory notes, and handed these to one of his two agents, with instructions that they were to remain in the custody of his attorney until the defendant should by telegram or letter give instructions for their issue as notes, and as to the amount for which they should be filled up. After the defendant left, the person to whom defendant had handed the documents, without waiting for instructions from the defendant, and in fraud of the defendant, filled in the blanks and sold them to the plaintiff, "who took them honestly and in good faith and without notice of the fraud, and gave full value for them." It was held, "that, as the defendant handed the notes to his agent as custodian only, and not with the intention that they should be issued as negotiable instruments, he was not estopped from denying the validity of the notes as between himself and the plaintiff, and that the action was not maintainable."

As stated before, I am considering this as if "a simple signature on a blank piece of paper" handed by the plaintiff to Stirton. It was, in fact, a form of a promissory note. The plaintiff had written nothing on it, but his signature on the face and again on the back. He will not say that the figures "\$440.50" and "Oct. 1st" and "December 1st," and the word "myself," may

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not have been on it when he signed, but that is as far as he will go. It was not given to Stirton that it might "be converted into a note" or that it might be used or negotiated as a note. The plaintiff signed the paper intending it not as a note but as a promise to pay premium for life insurance in case he submitted himself for, and passed, the necessary medical examination. He did not pass such examination; he did not even see the medical man. Stirton, who held the plaintiff's signature, was immediately notified by the plaintiff, but he, in fraud of the plaintiff, completed the form as a note, and negotiated it with the United Empire Bank. In my opinion, the case cited governs the present case, and, upsetting as that case may be of the opinions of bankers here, as to the true meaning of the sections of the Bank Act referred to, I must follow the authority. I quote from the judgments in that case:—

Vaughan Williams, L.J., at p. 744: "In my judgment it is of the very essence of the liability of a person signing a blank instrument that the instrument should have been handed to the person, to whom it was in fact handed, as an agent for the purpose of being used as a negotiable instrument, and with the intention that it should be issued as such."

It seems to me clear that what the plaintiff did was not to give to Stirton a promissory note or a paper that could be converted into a promissory note, or that Stirton would have any right or authority to deal with in any way until he should get that authority after the plaintiff's application for insurance had been accepted. In a sense, Stirton was the plaintiff's agent, as well as agent for the insurance company. Acting for the plaintiff, an application, the plaintiff's application, was taken, and so acting, the plaintiff made him the custodian of the paper with the plaintiff's signature, not as a note or to be negotiated as a note, but as evidencing an amount that the plaintiff would pay should an examination be passed, which, of course, was necessary before his application would be accepted.

Further, at p. 745, after giving the facts in the *Smith v. Prosser* case, Vaughan Williams, L.J., said: "Under these circumstances the authorities seem to shew that, in the absence of a delivery of notes to an agent with the intention that they shall be negotiated, or at any rate that the agent shall have power to negotiate

them, the signer is not responsible even to a *bonâ fide* holder for value." The case of *Baxendale v. Bennett* (1878), 3 Q.B.D. 525, and other cases, are discussed. This, in conclusion, is said, at p. 749: "The case seems to be one which is not covered by any rule deducible from the authorities. Plainly Telfer did that which he was not authorised to do, and it is contended by the defendant that he is entitled to set up that want of authority as a defence in this action. Why should he not do so? It is said that he is not so entitled because he delivered the notes to Telfer with the intention that they should be filled up and at the same time negotiated, and because at the time he informed his attorney that the reason was that he thought he might have occasion hereafter to give him instructions to fill up and negotiate the notes. . . . He only proposed that he should keep them so that they should be ready in case the defendant should at some future time make up his mind that he had need of money which should be raised by their negotiation."

Fletcher Moulton, L.J., at pp. 752 and 753, puts the case so that upon the facts of the present case, as I think them to be, the cases are not distinguishable on principle.

There was not, on the part of the plaintiff, any intention that the paper he signed should form the basis of a negotiable instrument. The plaintiff delivered the paper to Stirton as representing the company and the plaintiff until something else should happen. Until then Stirton was a mere custodian of the paper for the plaintiff.

See also Buckley, L.J., at p. 755.

The case of *Lloyd's Bank Limited v. Cooke*, [1907] 1 K.B. 794, to which case I was referred by counsel for the defence on the argument, was considered in *Smith v. Prosser*, and was thought to have no application.

The fact that the note is now in the possession of the plaintiff can make no difference. It is at the defendants' call and for their use. The plaintiff has not, by obtaining it from the defendants' bank, under the circumstances given in evidence, and as to which there is no dispute, assented to or confirmed or ratified the use of his money in payment of it.

This action will not in any way prejudice the rights of the defendants, if any, against the United Empire Bank.

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D. C. There will be judgment for the plaintiff for \$440.50 with interest
1910 from the 4th December, 1908, at five per cent. per annum, with
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HOME BANK. The defendants appealed from the judgment of BRITTON, J.
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March 21. The appeal was heard by a Divisional Court composed of MULOCK, C.J.Ex.D., MACLAREN, J.A., and CLUTE, J.

Bicknell, K.C., and *A. E. Knox*, for the defendants. The instrument in question here, when it came to the defendants' hands, was a promissory note, fulfilling all the conditions required by sec. 176 of the Bills of Exchange Act, R.S.C. 1906, ch. 119. Though the amount was not filled in in writing, yet it was on the instrument in figures in the upper left-hand corner; and by reading the note with the figures as the beginning of the sentence of which the note is composed, the same sense is had as if the amount were written in. There was a physical delivery: see sec. 2 (f) of the Bills of Exchange Act. It was delivered to Stirton by the plaintiff in order that it might be converted into a note. The note was negotiated to the defendants as holders in due course, and is valid and effectual in the defendants' hands, even if in filling it up Stirton committed a fraud as against the plaintiff. See secs. 31 and 32 of the Bills of Exchange Act. The plaintiff intended that the document which he handed to Stirton should form the basis of a promissory note, as the indorsement shews, and cannot now say that he limited Stirton's power in a way not obvious on the face of the instrument: *Smith v. Prosser*, [1907] 2 K.B. 735, at p. 752.

Falconbridge, for the plaintiff. This case is governed by *Smith v. Prosser*, [1907] 2 K.B. 735. It does not depend on notice. The judgment was based on the broad ground that the document never came into existence as a promissory note, even in embryo; not on the fact of whether there was or was not notice. The document in question here was not delivered to Stirton in order that it might be converted into a note, or used or negotiated as a note. There was no intention on the part of the plaintiff that the paper he signed should form the basis of a negotiable instrument. Therefore, it never came into existence as a promissory note. The case of *Lloyd's Bank Limited v. Cooke*, [1907] 1 K.B. 794, is distinguished in *Smith v. Prosser*.

Bicknell, in reply. The case of *Smith v. Prosser*, relied on by the plaintiff as governing this case, is distinguishable, first, because in that case the holder had notice, whereas here the holder had no notice; and also because in that case the instrument was not negotiated after completion. Under the state of facts in *Smith v. Prosser* the defendant there was not estopped from denying that the notes were made by his authority; here the plaintiff is estopped: *Lloyd's Bank Limited v. Cooke*, [1907] 1 K.B. 794, at p. 807. I refer also to Everest & Strode's Law of Estoppel, 2nd ed., p. 300; *In re North British Australasian Co., Ex p. Swan* (1859), 7 C.B.N.S. 400; *London and South Western Bank v. Wentworth* (1880), 5 Ex. D. 96.

March 22. MULOCK, C.J.:—The Court is of opinion that the case of *Smith v. Prosser*, [1907] 2 K.B. 735, relied upon by Mr. Falconbridge, counsel for the respondent, and referred to and relied on by the trial Judge, governs in this case. We can add nothing to what has been set forth in the judgment of the trial Judge, and, for the reasons assigned by him, we think this appeal fails and should be dismissed with costs.

MACLAREN, J.A.:—I agree, but desire to add two brief observations. First, I do not wish to be understood as expressing any opinion as to the charging up of the note against the savings bank account of the plaintiff, as, in my opinion, this has nothing to do with the ground upon which the case turns. Second, I consider that the evidence of the plaintiff shews that the instrument he gave to Stirton was to be completed as a promissory note under certain circumstances, as the following extract from his evidence shews:—

“His Lordship. If you passed the examination, then the note was to be good? A. Yes.

“Q. You intended it should be a note if you passed the examination? A. Yes, it was to be drawn on this date if I passed.”

This brings it precisely within the case of *Smith v. Prosser*, and our decision does not go beyond what was expressly decided there.

CLUTE, J.:—I agree with the Chief Justice.

The defendants moved in the Court of Appeal for leave to appeal to that Court from the order of the Divisional Court.

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April 18. The motion was heard by Moss, C.J.O., GARROW, MEREDITH, and MAGEE, JJ.A.

Bicknell, K.C., for the defendants. The facts in this case are not in dispute, but they raise a question of great importance to the mercantile community as to the construction of secs. 31 and 32 of the Bills of Exchange Act, upon which it is desirable that a decision should be obtained from this Court. The Divisional Court has adopted the view of the trial Judge that the case is governed by *Smith v. Prosser*, [1907] 2 K.B. 735, but that case illustrates the line of cleavage which separates the present case from those in which it has been held that the maker of a promissory note is not estopped from denying its validity. It is submitted by the defendants that the note in question was a completed instrument before its negotiation, and that they are entitled to the benefit of the proviso in sec. 32. The plaintiff is also estopped at common law from denying the validity of the note: *Lloyd's Bank Limited v. Cooke*, [1907] 1 K.B. 794. The following cases were also referred to: *In re North British Australasian Co., Ex p. Swan*, 7 C.B.N.S. 400; *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175.

Falconbridge, for the plaintiff. There was no such foundation of authority from the plaintiff to fill up the instrument as a promissory note, as is required both by the statute and at common law. The case is covered by *Smith v. Prosser*, as held by the trial Judge and the Divisional Court. I refer particularly to the judgment of Vaughan Williams, L.J., in that case, at pp. 742, 744, and to that of Fletcher Moulton, L.J., at p. 752. *Lloyd's Bank Limited v. Cooke* is distinguishable, as there the instrument was delivered in order to be filled up as a bill, while here it was delivered to the agent as a custodian only. The mere physical possession of an incomplete instrument by an agent is not sufficient to bind the maker, unless there is the intention on his part that it should be converted into a bill of exchange: Chalmers on Bills of Exchange, 7th ed., pp. 56, 57. The case is similar in many of its features to *Webb v. Box* (1909), 20 O.L.R. 220, in which leave to appeal was refused by this Court.

Bicknell, in reply.

April 19. The judgment of the Court was delivered orally by Moss, C.J.O.:—We have considered this case in all its aspects,

and it does not appear to us that any good ground has been presented for treating it as exceptional and allowing a further appeal.

The amount involved is small, under \$500, and the point in question, involving the construction of certain sections of the Bills of Exchange Act, has been considered by the trial Judge, and by the unanimous judgment of a Divisional Court, as being covered by authority.

The case involves a simple proposition of law arising upon the facts as found, and it appears to have been fairly dealt with by the Courts below. We see no good reason for allowing an appeal from their decision.

The motion must be refused with costs.

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END OF VOLUME XX.

APPENDIX.

Cases reported in the Ontario Law Reports decided on appeal to the Judicial Committee of the Privy Council and the Supreme Court of Canada, reported since the publication of volume 18 Ontario Law Reports:—

ARMSTRONG AND JAMES BAY R.W. Co., RE, 12 O.L.R. 137, affirmed by the Judicial Committee: JAMES BAY R.W. Co. v. ARMSTRONG, [1909] A.C. 624.

BERLIN AND WATERLOO STREET R.W. Co. AND TOWN OF BERLIN, RE, 19 O.L.R. 57, reversed by the Supreme Court of Canada: TOWN OF BERLIN v. BERLIN AND WATERLOO STREET R.W. Co., 42 S.C.R. 581.

CANADIAN PACIFIC R.W. Co. v. ALEXANDER BROWN MILLING AND ELEVATOR Co., 18 O.L.R. 85, affirmed by the Supreme Court of Canada: ALEXANDER BROWN MILLING AND ELEVATOR Co. v. CANADIAN PACIFIC R.W. Co., 42 S.C.R. 600.

FITZGERALD v. BARBOUR, 17 O.L.R. 254, affirmed by the Supreme Court of Canada: LOVELESS v. FITZGERALD, 42 S.C.R. 254.

GOODISON THRESHER Co. v. TOWNSHIP OF McNAB, 19 O.L.R. 188: leave to appeal refused by the Supreme Court of Canada: 42 S.C.R. 694.

METALLIC ROOFING Co. OF CANADA v. JOSE, 14 O.L.R. 156, reversed by the Judicial Committee and a new trial ordered: JOSE v. METALLIC ROOFING Co. OF CANADA, LIMITED, [1908] A.C. 514.

PRINGLE v. CITY OF STRATFORD, 20 O.L.R. 246: leave to appeal refused by the Supreme Court of Canada: WHYTE PACKING Co. v. PRINGLE, 42 S.C.R. 691.

TORONTO R.W. Co. AND CITY OF TORONTO, RE, 19 O.L.R. 396, affirmed by the Judicial Committee: TORONTO CORPORATION v. TORONTO R.W. Co., [1910] A.C. 312.

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See INSURANCE, 1.

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APPEAL.

1. *To Court of Appeal—Application for Leave to Appeal—Order of Divisional Court—Grounds of Appeal—Illegal Distress—Recovery of Double the Value of Goods Distrained—R.S.O. 1897, ch. 342, sec. 18 (2).*—The Court of Appeal refused an application by the defendants for leave to appeal to that Court from the judgment of a Divisional Court, 19 O.L.R. 540, the case not presenting any good ground for treating it as exceptional, and allowing a further appeal; the amount actually involved being under \$500; and the question of law not appearing to be a matter of sufficient doubt to justify prolonging the litigation.

OSLER and MEREDITH, J.J.A., discussed the points decided by the Court below, viz., the right to recover double the value of the goods distrained or sold under 2 W. & M., sess. 1, ch. 5, sec. 4, and the effect of changing the words "shall and may" in the original enactment to "may" alone in R.S.O. 1897, ch. 342, sec. 18, sub-

sec. 2; and considered that there was no plausible reason for saying that the judgment of the Court below was wrong. *Webb v. Box*, 220.

2. *To Court of Appeal—Jurisdiction—Case Stated by Magistrate—Summary Conviction under Provincial Act—Forum—Criminal Code, Part XV.—Ontario Summary Convictions Act.*—The Court of Appeal has no jurisdiction to hear an appeal, upon a case stated by a magistrate, from a summary conviction, under the Ontario Summary Convictions Act, for the contravention of a provincial statute. Under Part XV. of the Criminal Code a case may be stated for the opinion of "the court," but that means, in Ontario, the High Court of Justice: sec. 705 (b); sec. 2 (35) (a).

Semble, per OSLER, J.A., that it is doubtful whether sec. 2 of the Ontario Summary Convictions Act, R.S.O. 1897, ch. 90, goes far enough to confer jurisdiction upon the High Court; and sec. 2 of 1 Edw. VII. ch. 13 (O.), purporting to amend sec. 8 of R.S.O. ch. 90, is inapplicable—the reference to the 8th line of sec. 8 being probably a mistake for the 12th line of sec. 2. *Rex v. Henry*, 494.

3. *To Court of Appeal—Jurisdiction—Order of Divisional Court on Appeal from Judgment of District Court—Amount Involved.*—The Court of Appeal has no jurisdiction to entertain an appeal from the order of a Divisional Court of the High Court made

upon appeal from the judgment of a District Court, even where the amount involved exceeds \$1,000. There is one appeal only in all cases within the jurisdiction of the District Courts.

The provisions of secs. 9 and 10 of the Unorganized Territory Act and of secs. 50, 74, 75, 76, and 77 of the Judicature Act, considered. *Drewry v. Percival*, 489.

4. *To Divisional Court—County Court Judge—Audit of Engineer's Charges—Right of Appeal*—3 *Edw. VII. ch. 22, sec. 4 (O.)*—9 *Edw. VII. ch. 46 (O.)*—Where a County Court Judge, acting under 3 *Edw. VII. ch. 22, sec. 4 (O.)*, audits the charges of an engineer or surveyor employed or appointed under the Municipal Drainage Act, there is no appeal, by virtue of 9 *Edw. VII. ch. 46 (O.)* or otherwise, from his allowance or disallowance of charges upon such audit; CLUTE, J., dissenting. *Re Moore and Township of March*, 67.

5. *To Privy Council — Order Staying Reference Directed by Judgment — Discretion — Con. Rules 831-835—Stay of Execution—Judgment Directing Payment of Money—Con. Rule 832 (d.)*—An order of FALCONBRIDGE, C.J.K.B., staying proceedings on the reference directed by the judgment pending the determination of an appeal by the defendant to the Judicial Committee of the Privy Council from that judgment, was affirmed as a proper exercise of discretion.

Though Con. Rules 831 to 835, regulating the practice in this respect with regard to appeals to the Judicial Committee, differ in some respects from Con. Rules 826 to 829, as to appeals to the Court

of Appeal, the language of Con. Rule 832 is substantially the same as that of R.S.O. 1877, ch. 38, sec. 37, under which *City of Toronto v. Toronto Street R.W. Co.* (1887), 12 P.R. 361, was decided; and *semble*, applying and following that case, that the proceedings upon the reference were stayed pending the appeal, by force of the words "execution shall be stayed" in Con. Rule 832.

A judgment declaring that the plaintiff is entitled to damages, directing an inquiry as to them, and reserving further directions, is not a judgment which directs the payment of money, within the meaning of clause (d) of Con. Rule 832. *Sharpe v. White*, 575.

See ASSESSMENT AND TAXES, 1, 3, 4—BILLS AND NOTES—COSTS—DAMAGES — EVIDENCE — LANDLORD AND TENANT, 2—LIQUOR LICENSE ACT—NEGLIGENCE, 1—RAILWAY, 3—TRUSTS AND TRUSTEES—WRIT OF SUMMONS, 1, 2.

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See MECHANICS' LIENS, 1.

ASSESSMENT AND TAXES.

1. *Assessable Property—Buildings on Mineral Lands—Use for Mining Purposes — Assessment Act, sec. 36 (3)—Appeal from Order of Ontario Railway and Municipal Board — Question of Law — Amount of Assessment — Question of Fact.*—*Held*, affirming an order of the Ontario Railway

and Municipal Board, that certain buildings on mineral lands, buildings used for mining purposes, were assessable under the Ontario Assessment Act, 4 Edw. VII. ch. 23.

Per GARROW, J.A.:—The meaning of sub-sec. 3 of sec. 36 of the Assessment Act is that all buildings which add to the value of the land for any purpose, and not merely buildings which add to its agricultural value, are to be assessed. That is the sole statutory test applicable to all lands and to all buildings thereon. The construction placed upon sec. 36 by *BOYD, C.*, in *Canadian Oil Fields Co. v. Village of Oil Springs* (1907), 13 O.L.R. 405, is preferable to that placed upon it by a Divisional Court in the same case. The question whether the buildings were assessable was one of law and a proper subject of appeal to the Court of Appeal under sec. 51 of the Ontario Railway and Municipal Board Act, 1906; with the amount of the assessment the Court of Appeal had nothing to do, that being a question of fact. *Re Bruce Mines Limited and Town of Bruce Mines*, 315.

2. *Exemption — Building of Young Men's Christian Association*—63 Vict. ch. 140 (O.)—*Construction — "Purposes" — "Object"*—*Bed-rooms Rented to Members.*—By sec. 11 of the plaintiffs' incorporating Act, 63 Vict. ch. 140 (O.), the buildings of the plaintiffs and the land whereon the same were erected were declared to be exempt from taxation, "so long as the same are occupied by and used for the purposes of the association." The preamble stated the "object" of the association to be "the improvement of the spiritual, intellectual and social condition of

young men;" and sec. 3 stated that "the object of the said corporation shall be the spiritual, mental, social and physical improvement of young men by the maintenance and support of meetings, lectures, classes, reading rooms, library, gymnasiums, and such other means as may from time to time be determined upon." By sec. 1 the plaintiffs were empowered to acquire and hold real estate in Ottawa, provided the annual value of the real estate "so held and not actually used for the work" of the association should not exceed \$10,000; and to acquire other real estate by gifts, etc., under certain conditions. The plaintiffs erected a building for their use in Ottawa, and moved into it in 1909. A part of the building, containing nearly 100 bed-rooms for the sleeping accommodation of the members of the association who chose to rent them for that purpose, was assessed by the defendants in 1909:—

Held, that the whole of the building, both before and after the plaintiffs moved in, was occupied by and used for the purposes of the association; "purposes" in sec. 11 is not synonymous with "object" in the preamble and sec. 3; the renting of the bed-rooms did not take that part of the building out of the plaintiffs' occupancy; and it might be a means for the social and physical improvement of young men to supply them with clean and well-ventilated bed-rooms.

Judgment of *CLUTE, J.*, varied. *Ottawa Young Men's Christian Association v. City of Ottawa*, 567.

3. *Exemption of Factories—Powers of City Corporation—By-laws — Validating Statutes — Con-*

tracts — Construction — “Exemption from Taxation” — General Acts — Special Acts — Mandamus — Declaratory Judgment — Remedy by Appeal to Court of Revision.]— By two Acts of the Ontario Legislature, 62 Vict. ch. 82 and 63 Vict. ch. 98, the council of the city of Stratford were authorised to pass by-laws and enter into agreements with two manufacturing companies, whereby the companies were “to be given exemption from taxation” for the lands and premises whereon their buildings were to be erected, for a period of *twenty* years. When these special Acts were passed, the Municipal Act in force provided (sec. 411) that a municipal council might by by-law exempt any manufacturing establishment in whole or in part from taxation, *except as to school taxes*, for any period not exceeding *ten* years; and sec. 73 of the Public Schools Act then in force provided that no by-law for exempting any portion of the ratable property of a municipality from taxation in whole or in part should be held or construed to exempt such property from school rates of any kind whatsoever:—

Held, MEREDITH, J.A., dissenting, that, in the absence of anything to shew that in the special Acts the words “exemption from taxation” were intended to have a larger meaning and to exclude the exception, it should be considered, in accordance with the settled principle of construction, that the Legislature did not intend to do more than to alter the general law in so far as it was necessary to permit a longer period of exemption than by that law the council could grant, or to abandon the settled policy in respect of school rates since 1892; and therefore were liable to pay school rates

in respect of the property exempted by the special Acts.

Canadian Pacific R.W. Co. v. City of Winnipeg (1900), 30 S.C.R. 558, and *Regina ex rel. Harding v. Bennett* (1896), 27 O.R. 314, distinguished.

The plaintiff, on behalf of himself and the other ratepayers of the city, brought this action against the city corporation and the two companies for a mandamus compelling the city corporation to assess, levy, and collect from the companies school rates, as well for the past as for the future years of the twenty-year period, and for a declaration that the city corporation were in future bound to collect them:—

Held, OSLER, J.A., doubting, that, while the plaintiff had a remedy by appeal to the Court of Revision, that was not his only remedy; and he was entitled to a declaration of the true meaning and construction of the documents under which the exemptions were claimed.

In the circumstances, the measure of relief was a declaration applicable to the future only.

Judgment of MACMAHON, J., varied. *Pringle v. City of Stratford*, 246.

4. *Properties Assessed at over \$20,000—Reduction by Court of Revision to less than \$20,000—Right of Appeal to Ontario Railway and Municipal Board — Assessment Act, sec. 76—Ontario Railway and Municipal Board Act, 1906, sec. 51—Buildings on Mineral Lands — Assessable Property — Value—Question of Fact—Leave to Appeal.*]— Properties consisting of a number of lots laid out upon the town-site of Cobalt, being part of a mining location, some of the lots being

vacant and some having dwelling-houses and other erections thereon, were assessed against a mining company, who had acquired both the mineral and surface rights in the lots, at \$21,475. Upon appeal the Court of Revision reduced the amount to \$17,700. The company, not being satisfied, appealed to the Ontario Railway and Municipal Board. Their appeal was dismissed, and they then applied to the Court of Appeal for leave to appeal to that Court:—

Held, that leave should be refused.

Per Moss, C.J.O.:—To entitle a person to appeal to the Railway and Municipal Board under the combined effect of sec. 51 of the Ontario Railway and Municipal Board Act, 1906, and sec. 76 of the Assessment Act, it is not necessary that the amount of the assessment fixed by the Court of Revision on one or more of such person's properties should aggregate \$20,000; the amount of the assessment made by the assessor is the determining factor.

Buildings upon the lands, whether to be treated as "mineral lands" or otherwise, are subject to be valued and assessed against the owners, and the question of the value is a question of fact, as to which no appeal lies to the Court of Appeal under sec. 51 of the Ontario Railway and Municipal Board Act, 1906, or otherwise.

Per MEREDITH, J.A.:—The question before the Board was one of fact, not one of law; and no appeal lay. *Re Coniagas Mines Limited and Town of Cobalt*, 322.

5. *Tax Sale — Assessment Roll — Indefinite Description of Land — Joining two Lots in one Assessment — Invalidity of Sale — Assess-*

ment Act, 1904, sec. 172—*Lands of Non-resident—Occupant Purchasing at Sale.*]—In 1906 a city corporation sold to the defendant for the taxes of 1901 and 1902 nine feet of lot 19 on the north side of Lennox street. The land advertised for sale was "part of lots 18 and 19, plan 120, 42 x 53, commencing," etc. Upon the assessment rolls for 1901 and 1902 the land was set down as a vacant lot on Bathurst street, "rear 767-9, 53 x 50," etc. Neither lot 19 nor lot 18 on the north side of Lennox street had any frontage on and neither lot touched Bathurst street:—

Held, that the sale was invalid because there was no valid assessment of the land in 1901 and 1902, and there were, therefore, no taxes legally imposed for which it could be sold for taxes for those years. If the assessment could be treated as one of lots 18 and 19 according to a registered plan, the joining of them in one assessment was improper, and the assessment was, therefore, invalid. And the defect was not cured by sec. 172 of the Assessment Act, 1904.

Christie v. Johnston (1866), 12 Gr. 534, followed.

Seemle, per MEREDITH, C.J.C.P., that, as the land was occupied by the defendant when the assessment was made, and was owned by a person not resident in Ontario, who had not required her name to be entered on the assessment roll, it should have been assessed in the name of and against the defendant, and she, for the purpose of imposing and collecting taxes upon and from the land, was to be deemed the owner of it (R.S.O. 1897, ch. 224, sec. 22); and therefore she was not entitled to become the purchaser at the tax sale, and so to deprive

the owner of part of her land, which was sold because the taxes which, if the assessor had done his duty, would have been payable by the defendant, had not been paid.

Judgment of RIDDELL, J., affirmed. *Blakey v. Smith*, 279.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

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ATTACHMENT OF DEBTS.

See WRIT OF SUMMONS, 3.

ATTEMPT TO COMMIT CRIME.

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BANKRUPTCY AND INSOLVENCY.

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BILL OF LADING.

See SALE OF GOODS.

BILLS AND NOTES.

Promissory Note — Incomplete Instrument—Delivery—Holder in Due Course—Bills of Exchange Act, secs. 31, 32—Leave to Appeal.]
—Where a document in the form

of a promissory note, but “wanting” in some “material particular,” is not “delivered in order that it may be converted into” a promissory note, payment cannot be enforced against the maker, even by a holder in due course, under secs. 31 and 32 of the Bills of Exchange Act.

Smith v. Prosser, [1907] 2 K.B. 735, followed.

Judgment of BRITTON, J., affirmed by a Divisional Court.

Leave to appeal to the Court of Appeal refused. *Hubbert v. Home Bank of Canada*, 651.

See CONTRACT, 3, 5—MECHANICS' LIENS, 2.

BONUS.

See COMPANY, 6.

BROKER.

Purchase of Shares for Customer on Margin—Hypothecation—Conversion—Delivery of Shares—Contract—Terms of Bought Notes.]
The plaintiff sued for the conversion of and other wrongful dealings with shares of stock purchased for her by the defendants as her brokers, “on margin,” the complaint being that the defendants had pledged the shares bought for the plaintiff for a larger amount than that owing by the plaintiff:—

Held, on the facts, that there was no breach by the defendants of their contract with the plaintiff, which was largely a tacit one, both parties understanding the terms on which they were dealing.

2. That the terms of the bought notes afforded at the least some evidence of what the real tacit contract was; and they very plainly set forth a term as to

raising money upon the bought shares, in any way most convenient to the defendants.

3. That, assuming that the defendants were guilty of converting the plaintiff's shares, she could not recover; for, at the appointed time and in the agreed manner, her shares were duly transferred to her, accepted, and re-sold and re-transferred by her; and the "conversions" brought no profit to the defendants nor loss to the plaintiff.

Conmee v. Securities Holding Co. (1907), 38 S.C.R. 601, distinguished.

Order of a Divisional Court, 19 O.L.R. 545, affirmed. *Clark v. Baillie*, 611.

BUILDING CONTRACT.

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Beattie v. Dinnick (1896), 26 O.R. 285, followed.]—See CONTRACT, 4.

Beatty v. Beatty (1859), 17 U.C.R. 465, specially referred to.]—See LANDLORD AND TENANT, 3.

Beaudry v. Read (1907), 10 O.W.R. 622, approved by a Divisional Court, whose judgment was reversed by the Court of Appeal.]—See COMPANY, 3.

Bentsen v. Taylor, [1893] 2 Q.B. 193, followed.]—See COSTS.

Bernardin v. Municipality of North Dufferin (1891), 19 S.C.R. 581, followed.]—See COMPANY, 1.

Distinguished.]—See MUNICIPAL CORPORATIONS, 1.

Bibby v. Davis (1902), 1 O.W.R. 189, distinguished.]—See PUBLIC HEALTH ACT.

Brill v. Toronto R.W. Co. (1909), 13 O.W.R. 114, distinguished.] See STREET RAILWAYS, 2.

Browne v. Hare (1858-9), 3 H. & N. 484, 4 H. & N. 822, distinguished.]—See SALE OF GOODS.

Burrell v. Earl of Egremont (1844), 7 Beav. 205, followed.]—See CHARGE ON LAND.

Cambefort & Co. v. Chapman (1887), 19 Q.B.D. 229, noted as overruled.]—See CONTRACT, 3.

Campbell and City of Stratford, In re (1907), 14 O.L.R. 184, followed.]—See MUNICIPAL CORPORATIONS, 3.

Campbell v. Dunn (1892), 22 O.R. 98, followed.]—See INSURANCE, 2.

Canadian Pacific R.W. Co. v. City of Winnipeg (1900), 30 S.C.R. 558, distinguished.]—See ASSESSMENT AND TAXES, 3.

Canadian Pacific R.W. Co. v. Township of Chatham (1896), 25 S.C.R. 608, distinguished.]—See MUNICIPAL CORPORATIONS, 1.

Canadian Radiator Co. v. Cuthbertson (1905), 9 O.L.R. 126, followed.]—See WRIT OF SUMMONS, 3.

Charsley v. Jones (1889), 53 J.P. 280, followed.]—See LANDLORD AND TENANT, 2.

Chew v. Traders Bank of Canada (1900), 19 O.L.R. 74, specially referred to.]—See LANDLORD AND TENANT, 1.

Christie v. Johnston (1866), 12 Gr. 534, followed.]—See ASSESSMENT AND TAXES, 5.

Clark v. Baillie (1909), 19 O.L.R. 545, affirmed.]—See BROKER.

Clark v. Barber, Re (1894), 26 O.R. 47, distinguished.]—See DIVISION COURTS.

Cleaver v. Mutual Reserve Fund Life Association, [1892] 1 Q.B. 147, 153, followed.]—See INSURANCE, 2.

Commissioner of Stamps v. Hope, [1891] A.C. 476, followed.]—See WRIT OF SUMMONS, 3.

Conmee v. Securities Holding Co. (1907), 38 S.C.R. 601, distinguished.]—See BROKER.

Cope v. Crichton (1899), 18 P.R. 462, followed.]—See NEGLIGENCE, 3.

Dixon v. Bell (1816), 5 M. & S. 198, followed.]—See NEGLIGENCE, 2.

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Harburg India Rubber Comb Co. v. Martin, [1902] 1 K.B. 778, followed.]—See CONTRACT, 4.

Harris v. Perry & Co., [1903] 2 K.B. 219, followed.]—See RAILWAY, 2.

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Herman v. Wilson (1900), 32 O.R. 60, distinguished.]—See COMPANY, 4.

Holme v. Guppy (1838), 3 M. & W. 387, followed.]—See CONTRACT, 2.

ILLIDGE v. GOODWIN (1831), 5 C. & P. 190, explained and distinguished.]—See NEGLIGENCE, 1.

James v. Ontario and Quebec R.W. Co. (1886-8), 12 O.R. 624, 15 A.R. 1, followed.]—See RAILWAY, 3.

James Bay R.W. Co. v. Armstrong, [1909] A.C. 624, followed.]—See RAILWAY, 3.

Jewell v. Broad (1909), 19 O.L.R. 1, affirmed.]—See INFANT.

Lake Ontario Navigation Co., Re, Davis's Case, Hutchinson's Case (1909), 18 O.L.R. 304, reversed.]—See COMPANY, 5.

Lawford v. Billericay Rural District Council, [1903] 1 K.B. 772, followed.]—See COMPANY, 1.

Distinguished.] — See MUNICIPAL CORPORATIONS, 1.

Lazier v. Henderson (1898), 29 O.R. 673, distinguished.] — See LANDLORD AND TENANT, 1.

Logan, Township of, v. Hurlburt (1893), 23 A.R. 628, dictum of BURTON, J.A., at p. 657, approved.] — See PUBLIC HEALTH ACT.

McCraken, In re (1879), 4 A.R. 486, distinguished.] — See LANDLORD AND TENANT, 1.

Mackenzie v. Maple Mountain Mining Co. (1909), 20 O.L.R. 170, reversed.] — See COMPANY, 3.

Macpherson and City of Toronto, Re (1895), 26 O.R. 558, approved.] — See RAILWAY, 3.

Malone v. Laskey, [1907] 2 K.B. 141, specially referred to.] — See NEGLIGENCE, 3.

Miller v. Sarnia Gas Co. (1900), 2 O.L.R. 546, followed.] — See PARTIES.

Mirabita v. Imperial Ottoman Bank (1878), 3 Ex.D. 164, followed.] — See SALE OF GOODS.

Morris v. Cairncross (1907), 14 O.L.R. 544, specially referred to.] — See CHARGE ON LAND.

Murphy v. Wilson (1883), 44 L.T.N.S. 788, distinguished.] — See MASTER AND SERVANT, 2.

Murray v. Canada Central R.W. Co. (1882), 7 A.R. 646, specially referred to.] — See EVIDENCE.

Osborne v. Henderson (1889), 18 S.C.R. 698, distinguished.] — See CONTRACT, 5.

Pardoe v. Pardoe (1900), 16 Times L.R. 373, followed.] — See CHARGE ON LAND.

Patterson v. Central Canada Loan and Savings Co. (1898), 29 O.R. 134, followed.] — See CHARGE ON LAND.

Pile v. Salter (1832), 5 Sim. 411, not followed.] — See WILL, 2.

Railway Time Tables Publishing Co., In re, Ex p. Sandys (1889), 42

Ch.D. 98, distinguished.] — See COMPANY, 5.

Rathbone v. Michael (1909), 19 O.L.R. 428, affirmed.] — See EVIDENCE.

Distinguished.] — See MECHANICS' LIENS, 2.

Regina v. Dillon (1877), 14 Cox C.C. 4, followed.] — See CRIMINAL LAW, 8.

Regina v. Thompson, [1893] 2 Q.B. 12, 17 Cox C.C. 641, distinguished.] — See CRIMINAL LAW, 5.

Regina ex rel. Harding v. Bennett (1896), 27 O.R. 314, distinguished.] — See ASSESSMENT AND TAXES, 3.

Rex v. Drummond (1905), 10 O.L.R. 546, followed.] — See CRIMINAL LAW, 8.

Rex v. Elliott (1905), 9 O.L.R. 648, distinguished.] — See CRIMINAL LAW, 4.

Rex v. Le Gros (1908), 17 O.L.R. 425, followed.] — See CRIMINAL LAW, 8.

Rex v. Sheriff of Herefordshire (1831), 1 B. & Ad. 672, followed.] — See DIVISION COURTS.

Rose v. Rogers (1870), 39 L.J.N. S.Ch. 792, not followed.] — See WILL, 3.

Ryan v. McIntosh (1909), 20 O.L.R. 31, referred to.] — See LANDLORD AND TENANT, 2.

Saltfleet, In re Local Option By-law of the Township of (1908), 16 O.L.R. 293, followed.] — See MUNICIPAL CORPORATIONS, 2.

Scott, In re, [1903] 1 Ch. 1, followed.] — See WILL, 3.

Scott v. Scott (1890), 20 O.R. 313, distinguished.] — See INSURANCE, 2.

Sievert v. Brookfield (1905), 35 S.C.R. 494, followed.] — See RAILWAY, 2.

Smith v. City of London (1909), 20 O.L.R. 133, followed.] — See CONSTITUTIONAL LAW, 2.

Smith v. Prosser, [1907] 2 K.B. 735, followed.]—See **BILLS AND NOTES**.

Struthers v. Mackenzie (1897), 28 O.R. 381, distinguished.]—See **COMPANY**, 2.

Tanner v. Weiland (1900), 19 P.R. 149, followed.]—See **COSTS**.

Tempest, In re, L.R. 1 Ch. 485, followed.]—See **TRUSTS AND TRUSTEES**.

Toronto, City of, v. Toronto Street R.W. Co., 12 P.R. 361, applied and followed.]—See **APPEAL**, 5.

Toronto Dental Manufacturing Co. v. McLaren (1890), 14 P.R. 89, 92, distinguished.]—See **CONTRACT**, 3.

Toronto Public Library Board v. City of Toronto (1900), 19 P.R. 329, referred to.]—See **PUBLIC HEALTH ACT**.

Underhill v. Roden (1876), 2 Ch.D. 494, followed.]—See **WILL**, 2.

Webb v. Box (1909), 19 O.L.R. 540, leave to appeal from, refused.]—See **APPEAL**, 1.

Wegg Prosser v. Evans, [1894] 2 Q.B. 101, [1895] 1 Q.B. 108, followed.]—See **CONTRACT**, 3.

Wilson v. Finch-Hatton (1877), 2 Ex.D. 336, followed.]—See **LANDLORD AND TENANT**, 2.

Young v. Kershaw (1899), 81 L.T.R. 531, specially referred to.]—See **EVIDENCE**.

CERTIFICATE OF TITLE.

See **QUIETING TITLES ACT**.

CERTIORARI.

See **CRIMINAL LAW**, 3.

CHARGE ON LAND.

Mortgage Paid by Tenant for Life—Absence of Evidence to Shew Intention to Exonerate Fee—Discharge of Mortgage—Registration—

Preservation of Charge—Statute of Limitations—Duty to Keep down Interest—Payment to Save Bar—Will—Second Life Estate—Intervening Period—Receipt of Rents and Profits—Election—Permissive Waste—Voluntary Waste.]—The testator, dying in 1877, devised mortgaged land to his son in fee, subject to a life estate to the plaintiff, his wife, defeasible on the son's attaining majority. The will directed that the plaintiff should have the sole control of the testator's farm, which consisted of the mortgaged land and of an adjoining lot, during the continuance of her life interest, and she was the residuary devisee of all the testator's real and personal property. The will contained no direction as to payment of debts and no reference to the mortgage. After her husband's death, the plaintiff, who lived on the mortgaged land with her family, or rented it, paid off the mortgage by a number of payments, out of her own moneys, and in 1888 obtained a discharge of the mortgage, which she retained in her own possession. The son became of age in 1892, and died in 1900, having by his will devised the land to the plaintiff, "to be used by her as she might deem fit during her lifetime," with remainder to his four sisters in fee. He knew that the plaintiff had paid off the mortgage. From the time the son became of age until his death, the plaintiff remained in possession of the land, receiving the rents and profits as before, and the son and unmarried daughters lived with her. On the 5th December, 1903, the plaintiff registered the discharge of the mortgage. Up to the time this action was brought (the 30th September, 1909), she made no claim for repayment of the

moneys paid by her; and there was no evidence of any expressed intention on her part to pay the mortgage off for her own benefit or for the benefit of those entitled in remainder:—

Held, that the plaintiff was entitled to treat the principal money paid by her in discharge of the mortgage as a subsisting charge in her favour upon the mortgaged lands; and her right was not affected by the taking or registration of the discharge.

Held, also, that the plaintiff's claim to a lien or charge for the moneys paid was not barred by the Statute of Limitations. When the son became of age and the plaintiff's first life estate came to an end, the statute began to run, and continued to do so until the death of the son. But the plaintiff's new life estate then came into existence, and with it the right to the rents and profits and the corresponding obligation to keep down, out of them, the interest on the still existing charge. The result of payment of the interest in this way was that the statute was not a bar.

Burrell v. Earl of Egremont (1844), 7 Beav. 205, followed.

Held, also, that the plaintiff was not bound to elect between the retention of the charge and the acceptance of the life estate under her son's will.

Held, also, that the plaintiff was chargeable with whatever she received during the eight years which elapsed between the termination of the first life estate and the commencement of the second, over and above what was paid on account of the household expenditure.

Held, also, that, as no express duty to repair was imposed by the

will, the plaintiff was not impeachable for permissive waste.

Patterson v. Central Canada Loan and Savings Co. (1898), 29 O.R. 134, followed.

Morris v. Cairncross (1907), 14 O.L.R. 544, specially referred to.

Held, however, that the plaintiff was liable for voluntary waste, having cut and sold timber and cordwood, not in the ordinary process of clearing the land; the terms of the son's devise not being large enough to authorise what she did.

Pardoe v. Pardoe (1900), 16 Times L.R. 373, followed. *Currie v. Currie*, 375.

CHARITABLE CORPORATION.

See COMPANY, 1.

COLLISION.

See RAILWAY, 2.

COMPANY.

1. *Charitable Corporation—Contract not under Seal—Necessary Work—Benefit of Corporation—Partly Executed Contract—Powers of Corporation—Recovery for Work Done—Quantum Meruit.*—Upon the question of the liability of a corporation for work done for the corporation upon a contract not under seal, the distinction once insisted on, as to the work being "essential" for the purposes of the corporation, is modified by the trend of recent decision, so that "beneficial" work is enough if it be incidental or ancillary to the purposes for which the corporation exists. Complete execution of the contract is not essential where there is actual part performance, and the completion of the work has been prevented by the act of the corporation.

Lawford v. Billericay Rural Dis-

trict Council, [1903] 1 K.B. 772, and *Bernardin v. Municipality of North Dufferin* (1891), 19 S.C.R. 581, followed.

The defendants, a benevolent community, incorporated by the Canadian statute 12 Vict. ch. 108, for the maintenance of an hospital, almshouse, and seminary of education for orphans, held, as authorised by the Act, a tract of land which they worked as a farm for stock and dairy purposes, using the produce almost entirely for the sustenance of the members of the community and their charges. The plaintiffs agreed (not in writing) with the defendants' manager to drill and make a well upon the farm at a price of \$2 per foot, an additional well being needed for farm purposes. The manager was empowered to make such a contract at an expense of \$200, as between her and the defendants. The plaintiffs dug to a depth of 154 feet, but found no water, and were then discharged by the manager:—

Held, that the contract was *intra vires* of the corporation, having regard to the provisions of their Act of incorporation, and, though not under the corporate seal, was binding on the corporation, upon the principles above stated.

Held, also, that the plaintiffs were entitled to recover for the value of the work done as far as it went, in effect upon a *quantum meruit*, which should be determined by the contract price.

Judgment of BRITTON, J., reversed. *Campbell v. Community General Hospital Almshouse and Seminary of Learning of the Sisters of Charity, Ottawa*, 467.

2. *Electric Railway Company—Powers of Provisional Directors—*

Contract with Promoters of Rival Railway—Electric Railway Act, sec. 44—Contract Made by Officers of Unorganised Company—Misrepresentation of Fact—Damages.]

—The provisional directors of the defendant company, incorporated by 1 Edw. VII. ch. 92 (O.), to build an electric railway, gave power to their president and secretary to make a bargain with the plaintiffs, who were promoting a rival electric railway. A bargain was made, and the result reported to the provisional directors, who ratified what had been done. The contract purported to be made between the defendant company and the plaintiffs; the plaintiffs were to cease operations in support of any other rival railway and to assist the defendant company in securing franchises, etc., and were to receive \$1,000. The plaintiffs carried out their part of the bargain, and now sued the company for the \$1,000, asking in the alternative damages for misrepresentation against the president and secretary, who were joined as defendants. The defendant company had not been organised at the time of the contract; but the president and secretary believed that the company had power to enter into the contract; and they represented to the plaintiffs, and the plaintiffs believed, that they had power to make the contract. The president and secretary were guilty of no fraud. The Act of incorporation provided (sec. 12) that the several clauses of the Railway Act should be incorporated with and deemed to be part of the Act of incorporation:—

Held, having regard to the provisions of sec. 44 of the Electric Railway Act, R.S.O. 1897, ch. 209, that the provisional directors had

no power to enter into the contract, and the contract was not binding on the company, nothing having been done to ratify it.

Held, however, that, as the power of the company to enter into such a contract was not excluded by its Act of incorporation, but depended upon facts as to organisation, etc., the representation of the president and secretary was not as to law, but as to fact, and they were liable to the plaintiffs therefor.

Struthers v. Mackenzie (1897), 28 O.R. 381, distinguished. *Selkirk v. Windsor Essex and Lake Shore Rapid R.W. Co.*, 290.

3. *Services of President—Remuneration—General By-law—Confirmation by Shareholders—Resolution Fixing Amount—Ontario Companies Act, sec. 88.*—Section 88 of the Ontario Companies Act, 7 Edw. VII. ch. 34, provides that “no by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting.”—

Held, that this means that a by-law for the remuneration of directors shall first be passed by the board of directors, and then laid before a general meeting and passed upon by the body of shareholders.

The provisional directors of a company adopted a by-law providing that the president, vice-president, and directors should receive such remuneration for their services as might by resolution of the board be determined, and no further by-law or confirmation by the shareholders, other than the confirmation of this general by-law, should be necessary to provide for such remuneration. At a general meeting of the shareholders this and the other by-laws

adopted by the provisional directors were confirmed by resolution; at a subsequent meeting of the shareholders a resolution that a salary of \$100 a month be paid to the president was carried; and at a meeting of the directors held thereafter a motion to the same effect was carried:—

Held, by a Divisional Court, BRITTON, J., dissenting, that the statute had not been complied with, and the president was not entitled to the salary voted.

Beaudry v. Read (1907), 10 O.W.R. 622, approved.

Judgment of CLUTE, J., affirmed.

Held, by the Court of Appeal, that the purpose or object of sec. 88 of the Ontario Companies Act, 7 Edw. VII. ch. 34, providing that no by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting, is that those who govern the company shall not have it in their power to pay themselves for their services without the shareholders' sanction.

And *held*, reversing the decisions of CLUTE, J., and a Divisional Court, that there had been, on the facts there set out, a substantial, if not a literal, compliance with the enactment; and the plaintiff was entitled to recover the salary voted to him as president.

A seal is not necessary to the validity of a by-law, unless it is required by the constitution or by-laws of the company.

Distinction between a by-law and a resolution pointed out. *Mackenzie v. Maple Mountain Mining Co.*, 170, 615.

4. *Wages of Labourers—Equitable Assignment—Unsatisfied Judgment Obtained by Assignee against Company—Action by As-*

signee against Directors—Irregularity of Judgment—Validity—Ontario Companies Act, 7 Edw. VII. ch. 34, sec. 94.]—The plaintiff, by an oral agreement between himself, an incorporated company, and the company's wage-earners, supplied goods to the wage-earners, to be paid for out of the wages. The plaintiff at the end of each month was to hand and did hand in to the company particulars of his account against the men, and the company was to keep out of the men's wages the amount of the account, and hold the amount for the plaintiff. The company was allowed by the plaintiff \$10 a month in part for its trouble in collecting. The plaintiff did not discharge the liability of the men for the goods bought by them until the money had been actually paid over by the company:—

Held, that there was a good equitable assignment of the wages; and, the company having debited the wage-earners' accounts with the amounts of the plaintiff's accounts for two months, and not having paid either the plaintiff or the wage-earners, the plaintiff was in a position to sue the company for the amount of his claim.

He did so, joining in one action with certain wage-earners, and, the company not appearing and not objecting, the plaintiffs in that action obtained a judgment against the company for the amounts of their several claims respectively. Execution against the company having been returned unsatisfied, the plaintiff, under sec. 94 of the Ontario Companies Act, 7 Edw. VII. ch. 34, sued the directors of the company for the amount for which judgment had been recovered by him alone:—

Held, that the judgment, though irregular, could not be attacked by the defendants, in the absence of fraud, which was not alleged; and the plaintiff, as an assignee of wages, came within sec. 94, and was entitled to recover against the directors.

Herman v. Wilson (1900), 32 O.R. 60, distinguished.

Judgment of TEETZEL, J., affirmed. *Lee v. Friedman*, 49.

5. *Winding-up—Contributory—Shares—Conditional Application—Allotment—Right to Repudiate—Conduct Approbating Contract—Estoppel—Director—Misfeasance.*]—D. made an application in writing to the company for 130 shares of stock, of the par value of \$13,000, agreeing to pay therefor the sum of \$1,300, "on the condition that no further call be made thereon." At a directors' meeting the application was accepted by resolution, and the shares allotted to D., in consideration of \$1,300 to be paid on demand. In the minutes of the proceedings at the meeting there was a memorandum, following the resolution, that the shares "were allotted and issued on the condition that no further call would be made thereon." The meaning was that the shares were to be considered as fully paid-up. No written notice was given to D., but H., the president, informed him of the action of the directors, and D. gave the company his cheque for the \$1,300, and gave a proxy in favour of another shareholder to vote at a meeting of shareholders. The proxy was used for voting for directors at the meeting, but objection was raised as to the right of D. to vote on these shares. H. informed D. of the objection raised, and D. at

once stopped payment of his cheque, and informed H. that he would have nothing more to do with the shares. Three months later a winding-up order was made. It appeared that D.'s name was on the register as the holder of 130 shares, and there was among the company's papers a certificate, signed by the president and secretary, stating that D. was the owner of 130 shares, but not stating whether they were fully paid-up or not. There was no evidence that D. was aware either of the entry or the certificate:—

Held, that D. was not liable as a contributory.

In re Railway Time Tables Publishing Co., Ex p. Sandys (1889), 42 Ch.D. 98, distinguished.

Per MACLAREN, J.A., that it was not necessary, in the circumstances, for D. to bring an action to have his name removed from the register; his repudiation was sufficient.

Held, also, that, D. not being liable, H. could not be liable for misfeasance for acquiescing in the stopping of payment of D.'s cheque, and thereby causing a loss to the company of \$1,300.

Decision of TEETZEL, J., 18 O.L.R. 354, reversed. *Re Lake Ontario Navigation Co., Davis's Case, Hutchinson's Case*, 191.

6. *Winding-up—Contributories—Shares Allotted as Paid-up—Application of Municipal Bonus in Payment—Mistake of Law—Acceptance of Shares—Liability.*—Promoters of a manufacturing company agreed with a town corporation to form the company and establish an industry in the town, and the town corporation agreed, upon certain conditions, to give a bonus of \$15,000 to the company. The company was formed, a by-

law was passed authorising the issue of debentures to procure the money to pay the bonus, and the money was procured and paid over to the company. Pursuant to a resolution of the shareholders, shares called "bonus shares" were allotted as paid-up shares to the persons who were shareholders at the date of the resolution, to the amount of \$15,000, in proportion to the stock held by them at that date. Certificates of these bonus shares were issued to the respective persons named therein as the holders thereof, and they received the same with full knowledge of the circumstances. With that knowledge, they accepted the certificates, gave receipts for them, assented to their names being on the register in respect of them, received dividends, and treated and dealt with their respective shares as their property:—

Held, that they had accepted the shares and become shareholders in respect thereof; and, on the fair construction of the agreement and by-law, the \$15,000 was the property of the company, and not of the promoters, and was part of the assets of the company; the bonus shares could not be regarded as paid-up by the application of the \$15,000 in payment thereof; the persons to whom the bonus shares were allotted, although they acted under a mistaken belief, were not entitled to be relieved from the obligation to pay for the shares which they had accepted; and they were properly placed on the list of contributories in respect thereof, in the winding-up of the company.

Order of BRITTON, J., affirmed. *Re Cornwall Furniture Co.*, 520.

7. *Winding-up—Contributories—Issue of Treasury Stock to Ex-*

isting Shareholders as Paid-up—No Payment Made—Acceptance—Government Return — Liability.]

—The directors of a company, incorporated under the Ontario Companies Act, R.S.O. 1897, ch. 191, in 1906 made a ratable distribution of treasury or company stock, to be treated as paid-up, to the extent of \$7,500, among the existing shareholders. For this nothing was given to the company by the shareholders or by any one. In the annual return to the Government made by the company in January, 1907, and in the company's books, the transaction appeared as if \$7,500 had been paid on account of stock in 1906. The names of the shareholders were placed on the register in respect of these shares, and they (or some of them) accepted the shares and allowed their names to remain on the register, and they appeared there at the time when an order was made for the winding-up of the company:—

Held, that the issue of the unissued stock belonging to the company, to the extent of \$7,500, as paid-up stock, was in violation of the statute, and *ultra vires*; all the shareholders, and not merely the directors, were affected with notice or knowledge of this; and, whatever remedy they might have had before the winding-up order, they had no right, as against the liquidators, representing creditors, to say that the shares were fully paid-up.

The names of the shareholders who had accepted the shares were, therefore, placed on the list of contributories.

Order of the Local Judge at Goderich varied. *Re Clinton Thresher Co.*, 555.

See CONTRACT, 5.

COMPENSATION.

See MINES AND MINERALS—RAILWAY, 3.

CONDITIONAL APPEARANCE.

See WRIT OF SUMMONS, 2, 3.

CONSPIRACY.

See CRIMINAL LAW, 4.

CONSTITUTIONAL LAW.

1. *Powers of Provincial Legislature — Authorising Municipal Corporations to Acquire and Distribute Electric Energy—B. N. A. Act, sec. 92 (8), (10)—Validation of Contracts with Hydro-Electric Power Commission—Stay of Pending Actions—Right of Court to Inquire into Validity of Statutes.]*—The statutes 6 Edw. VII. ch. 15, as to electrical power, 7 Edw. VII. ch. 19, superseding the former, except as to contracts already entered into, 8 Edw. VII. ch. 22 and 9 Edw. VII. ch. 19, both providing for the validation of by-laws and contracts made under the former Acts, are *intra vires* of the Ontario Legislature.

By sec. 8 of the last-mentioned Act, it is provided that every action theretofore brought and then pending wherein the validity of a contract or by-law validated by the Act is attacked, shall be forever stayed:—

Held, that it was open to the Court, notwithstanding the wide language used—referring to this very action—to inquire into the legislative competence to deal with the whole subject-matter.

The supply of light is a proper function of municipal administration; and a municipal corporation may be authorised to engage in the business of acquiring and dis-

tributing electric energy, as one of the incidents of municipal government, and coming within the words "Municipal Institutions in the Province:" sec. 92 (8) of the British North America Act. The Provincial Legislature has power to establish electrical works as a local work or undertaking under clause 10 of the same section; and consequently it has power to delegate this undertaking to a competent municipal body. This does not infringe upon "Trade and Commerce," as used in sec. 91 (2)—these words point to political arrangements in regard to trade, regulation of trade in matters of inter-provincial concern, and the like.

The provisions of the statutes above-mentioned, validating the by-law and contract of the defendants and staying the action, are within the competence of the Legislature. When the Provincial Legislature exercises plenary power within the constitutional limits of the Imperial Federation Act, any statute so enacted is not to be revised or supervised by the judicial body.

Declaration that the statutes are within provincial competence, but no further order, and no costs.

Decision of RIDDELL, J., affirmed. *Smith v. City of London*, 133.

2. *Powers of Provincial Legislature — Authorising Municipal Corporations to Acquire and Distribute Electric Energy — B. N. A. Act, sec. 92 (8), (10)—Validation of Contracts with Hydro-Electric Power Commission—Stay of Pending Actions—Right of Court to Inquire into Validity of Statutes.*—In an action similar to *Smith v. City of London*, above, the decision in that case was followed, and

a declaration made that the statutes in question in both actions were *intra vires* of the Ontario Legislature.

Held, that the single point of difference, in that there was an existing electric light company in Toronto, was not a material difference. *Beardmore v. City of Toronto*, 165.

CONTRACT.

1. *Author and Publisher — Book Written for Specific Purpose—Refusal to Publish—Payment of Price—Offer to Return—Right to Manuscript—Tacit or Implied Term.*—The defendants, the publishers of a series of biographies called "Makers of Canada," employed the plaintiff, an author, to write one of the biographies, the Life of M. The contract was made by letters and in conversations between the parties, but the plaintiff had written an earlier book in the series, in regard to which there was a formal contract. In the letters referred to there was no mention of publication, but the price was agreed on, and was paid to the plaintiff, who wrote the biography and delivered the manuscript to the defendants. They declined to publish it, on the ground that it was unsuitable for the series, whereupon the plaintiff offered to return the money paid, and demanded the manuscript, which the defendants refused to deliver:—

Held, Moss, C.J.O., dissenting, that the plaintiff was entitled to the manuscript.

Judgment of CLUTE, J., affirmed.

Per GARROW, J.A., that the written evidence must be considered in the light of the surrounding circumstances; that

both parties intended when the contract was made that the proposed book should be published as one of the series, and such publication formed a material part of the consideration to the plaintiff in undertaking the work; and the inference was, that if, when the book was written, it was considered by the defendants unfitted for the series, they would return the manuscript and thus enable the plaintiff to secure publication elsewhere; they had no right, under any view of the agreement, to keep it, and also refuse to publish; or, in another view, that there was a complete rejection of the book, which the plaintiff accepted as final, whereupon the contract was at an end, and the defendants entitled to get back their money and the plaintiff his manuscript.

Per MACLAREN, J.A., that the whole contract was not in the letters, and it was impossible to find what the contract was without importing into it the facts and circumstances under which it was made; and the surrounding circumstances all pointed to the conclusion that publication of the work was an implied term of the contract.

Per MEREDITH, J.A., that the terms of the contract were to be gathered from what passed between the parties upon the subject and the surrounding material circumstances; the plaintiff was selling the offspring of his intelligence and education, a thing the chief value of which was in its intangible properties; he was selling it for a specific purpose, publication in the series called "Makers of Canada;" in all the circumstances, there was no reasonable doubt that there were the two corresponding and de-

pending tacit, if not expressed, obligations: (1) that the book would be reasonably fit for the purposes for which it was written; and (2) that, if so fit, it would be published.

Per MOSS, C.J.O., that there was nothing in the circumstances of this case to take it out of the ordinary rule, or to import into the agreement between the parties the element of obligation to publish, and, in case of failure to do so for any reason, to return the manuscript. *Le Sueur v. Morang & Co. Limited*, 594.

2. *Building Contract — Penalty for Non-completion of Work by Certain Day—Contractor Delayed by Default of other Workmen — Work not Commenced until after Time for Completion — New Contract — Necessity for Proof of Damage by Delay — Provisions for Extension of Time.*—The plaintiff agreed with S. to do the slating, tinning, and tiling work required in the erection and completion of a house on or before the 1st August. The contract contained the following provisions: that the work should be completed by the day named, subject only to such provision for an extension of time as therein provided; that there might be alterations, etc., in the work, and an agreement might be made for an extension of time by reason thereof; that, if the plaintiff could not finish the work by the 1st August, he might be discharged by the architect; that each contractor on the work should be responsible to the other for loss caused by failure to finish work in proper time; that, should the plaintiff fail to finish the work by the 1st August, he should pay by way of liquidated damages \$1 per day thereafter that the works

should remain incomplete — due allowance to be made for extension of time for additional work or alterations, and for delay occasioned by the default of contractors for other parts of the work; and that, should any work be delayed upon (*sic*) the time mentioned in the agreement by weather or by strikes, the architect should have power to extend the time for the completion.

The carpenter's work was not done on the roof till the 3rd August, and the plaintiff's work, therefore, could not be commenced until after the time fixed for completion:—

Held, that the clause providing a penalty of \$1 a day for delay was applicable to the specific period only, and did not apply to delay after that period had expired. There was in effect a new contract for the performance of the work at the contract price, but the penalty clause was not revived and made applicable to delay in the after-prosecution of the work. For such delay the plaintiff might be liable, but only on proof of damage sustained thereby. Nor were the provisions in the contract for extension of time applicable after the period stipulated for in the contract had expired.

Hamilton v. Moore (1873), 33 U.C.R. 275, 520, and *Holme v. Guppy* (1838), 3 M. & W. 387. followed.

Judgment of the County Court of Wentworth varied. *Findlay v. Stevens*, 331.

3. *Joint Liability — Judgment against one Joint Contractor — Promissory Note—Right of Creditor against Co-contractor—Promise to Pay — Consideration — Forbearance—Knowledge of Material*

Facts—Partnership.] — The defendant ordered goods from the plaintiffs in the name of a certain company, and for the purposes of the company, which was about to be formed by himself and three other persons. The company never came into existence, but one of the four concerned, C., established and registered a pseudo-partnership under the company name, he, C., being the sole member, as the defendant alleged. The goods ordered by the defendant were supplied by the plaintiffs, and C. gave a promissory note for the price, signed in the name of the company and his own name. This was not paid, and the plaintiffs recovered judgment in an action upon it against the company and C. After this, the judgment being unsatisfied, the plaintiffs called on the defendant to pay, and he promised to pay if time was given to him. At this time the defendant knew of the note, but not, as he said, of the judgment:—

Semble, that there was in fact a partnership as to the goods at the time they were purchased, and all four persons were jointly liable.

But *held*, apart from the fact of partnership, that the goods were ordered and purchased originally on the joint account of the intending partners, and all would be equally and jointly liable; therefore, the judgment obtained on the note of the partnership represented by C. alone could only be a judgment against one of the joint debtors, and would work no detriment to the right of the plaintiffs to recover from the defendant on the original liability.

Toronto Dental Manufacturing Co. v. McLaren (1890), 14 P.R. 89, 92, distinguished.

Weg v. Prosser v. Erms, [1894]

2 Q.B. 101, [1895] 1 Q.B. 108 (which overrules *Cambefort & Co. v. Chapman* (1887)), 19 Q.B.D. 229), followed.

Held, also, that recovery against the defendant might rest on the new promise to pay, which was made for good consideration. Both parties knew all the material facts, and the fact that judgment was recovered on the note, whether known or not to the defendant, was not important, seeing that he knew how the note had been given.

Judgment of the County Court of York reversed. *Hough Lithographing Co. v. Morley*, 484.

4. *Statute of Frauds—Payment of Part of Execution Debt—Withdrawal of Execution—Promise of Stranger to Pay Balance—Evidence.*—The plaintiff had issued execution against L. and had placed the writ in the sheriff's hands, but, before any action was taken upon it, the defendant came to the solicitor of the plaintiff and offered, as the solicitor said, to pay \$250 on account of the judgment, and to pay the balance in four months, provided the execution was withdrawn. The plaintiff accepted the \$250, which was paid by a cheque of L., and withdrew the execution. The defendant had no interest in the transaction except as a friend of L.; he denied having undertaken to pay anything himself; and the promise alleged by the solicitor was not in writing:—

Held, that, even accepting the solicitor's version, the promise was to pay the debt of another, and was not enforceable because it did not satisfy the Statute of Frauds; but, on the evidence, the proper conclusion was that the promise had not been made.

Beattie v. Dinnick (1896), 27 O.R. 285, *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K.B. 778, and *Bailey v. Gillies* (1902), 4 O.L.R. 182, followed.

Judgment of the District Court of Nipissing reversed. *Young v. Milne*, 366.

5. *Transfer of Assets of Partnership to Incorporated Company—Assumption of Liabilities—Direct Right of Action by Creditors of Partnership against Company—Promise to Pay—Correspondence—Promissory Note—Election to Accept Company as Debtor—Novation.*—A trading partnership, indebted to the plaintiffs for goods supplied down to the 1st April, 1909, on the 10th of that month agreed to transfer all its assets and property to a new concern to be incorporated; the new company to assume the liabilities of the partnership. The company was incorporated under the Ontario Companies Act on the 15th April, 1909, and certificated as entitled to begin business on the 22nd June, 1909. After the incorporation, the partnership transferred its assets and property to the company, and the prospectus of the company, filed with the Provincial Secretary, set forth that the company had "purchased the former business and assets, subject to the liabilities of the said firm, which are to be assumed by the new company." A copy of this prospectus was sent by the company to the plaintiffs on the 6th May, 1909, with a letter regretting that the new company could not send a cheque, but saying that they "expected to be shortly in a position to meet your account," and trusted that an extension of time would be given. Correspondence followed during

some months, the plaintiffs pressing for payment and the company promising to pay and asking for time. A promissory note made by the company and by the members of the old partnership was in the course of the correspondence sent to the plaintiffs, but returned by them as not satisfactory. In October, 1909, the plaintiffs began this action, against the new company and the members of the old partnership, to recover payment of their debt, but did not press for judgment against the members of the partnership:—

Held, that the company having made a direct promise to the creditors to pay the debt, and having negotiated for an extension of time, there was sufficient evidence of the creation of the relationship of debtor and creditor to give a direct right of action; *MAGEE, J.*, dissenting.

Osborne v. Henderson (1889), 18 S.C.R. 698, distinguished.

Held, also, that, notice having been given to the plaintiffs of the incorporation of the company and the taking over of the old assets and the assumption of the old liabilities, and the assent of the plaintiffs being in effect asked, and they acceding and giving time, there was sufficient evidence of an election by the plaintiffs to accept the new company as their debtor in substitution for the original debtors; *MAGEE, J.*, dissenting.

Judgment of *FALCONBRIDGE, C.J.K.B.*, affirmed. *Stecker v. Ontario Seed Co. Limited*, 359.

See ASSESSMENT AND TAXES, 3
—BROKER—COMPANY, 1, 2, 5—
CONSTITUTIONAL LAW — INFANT
—MECHANICS' LIENS — MUNICIPAL CORPORATIONS, 1—PARTNERSHIP, 2—PUBLIC HEALTH ACT—

RAILWAY, 1—SALE OF GOODS—
WRIT OF SUMMONS, 3.

CONTRIBUTION.

See PARTNERSHIP, 2.

CONTRIBUTORY.

See COMPANY, 5, 67.

CONVERSION.

See BROKER.

CONVICTION.

See CRIMINAL LAW — LIQUOR
LICENSE ACT.

CORPORATION.

See COMPANY.

CORROBORATION.

See CRIMINAL LAW, 1, 2.

COSTS.

Security for Costs—Plaintiff out of Ontario — Increased Security — Powers of Master in Chambers— Order Made after Judgment and pending Appeal to a Divisional Court—Discretion—Costs already Incurred—Stay of Proceedings — Con. Rules 42, 825, 1204, 1208.]— Where the action had been tried and judgment given dismissing it, and the plaintiff was appealing to a Divisional Court:—

Held, that, the plaintiff being out of the jurisdiction, the Master in Chambers had power to make an order for increased security for costs, notwithstanding that the order, by virtue of Con. Rule 1204, effects a stay of proceedings, and that, by Con. Rule 42, clause 17 (d), staying proceedings after verdict or judgment is excluded from the Master's jurisdiction, and notwithstanding the provisions of

Con. Rule 825 that no security for costs shall be required on an appeal to a Divisional Court.

Bentsen v. Taylor, [1893] 2 Q.B. 193, and *Tanner v. Weiland* (1900) 19 P.R. 149, followed.

Held, also, that, on the facts of this case, the Master's discretion was properly exercised in making an order for increased security; and that, under Con. Rule 1208, there was power to make the additional security applicable to past as well as future costs.

Held, also, that the order should not contain a stay of proceedings, that being provided for by Con. Rule 1204.

Order of the Master in Chambers varied. *Stow v. Currie*, 353.

See CRIMINAL LAW, 3—LANDLORD AND TENANT, 3—SUCCESSION DUTY.

COUNSEL FEE.

See SUCCESSION DUTY.

COUNTY COURT JUDGE.

See APPEAL, 4—MUNICIPAL CORPORATIONS, 2.

COURT OF APPEAL.

See APPEAL, 1, 2, 3.

COURT OF REVISION.

See ASSESSMENT AND TAXES, 3, 4.

COURTS.

See APPEAL—DIVISION COURTS.

COVENANT.

See LANDLORD AND TENANT, 3.

CRIMINAL LAW.

1. *Attempt to Commit Incest—Indictable Offence—Criminal Code,*

secs. 204, 570—Evidence of Children of Tender Years—Canada Evidence Act, sec. 16—Corroboration—Statement or Complaint of Child—Admissibility.]—The prisoner was tried upon a charge of having attempted to commit incest with his daughter, a child of seven years of age, and was found guilty:—

Held, MEREDITH, J.A., dissenting, that, as the evidence shewed that the prisoner had done what he could to commit the crime of incest, sec. 570 of the Criminal Code applied to his case, and he was open to indictment under it.

Per MEREDITH, J.A., that under sec. 204 of the Criminal Code the concurrence of both persons in the wrong is a necessary part of the crime; there cannot be the statutory crime of incest where rape has been committed.

Held, also, MEREDITH, J.A., expressing no opinion, that the evidence of the prisoner's child and of another child of four years of age was properly received, though not under oath, by virtue of the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 16; and that this evidence was sufficiently corroborated by other evidence referred to below.

Held, also, OSLER, J.A., doubting, and MEREDITH, J.A., dissenting, that a complaint or statement made by the prisoner's child to one B., in whose charge she had been placed by her mother, was properly admitted in evidence. *Rex v. Pailleur*, 207.

2. *Attempt to have Carnal Knowledge of Child—Evidence of Child not on Oath—Criminal Code, sec. 1003—Corroboration—Sufficiency—Reasonable Evidence to Sustain Conviction.]—The prisoner was charged with the indictable offence under sec. 302 of the Code*

of having attempted to have unlawful carnal knowledge of a child under the age of fourteen years, to wit, of the age of seven or eight years. The trial Judge received the child's statement, without oath, under sec. 1003 of the Code, and upon that and other evidence convicted the prisoner of the offence charged, but reserved for the opinion of the Court of Appeal the questions whether the child's statement was sufficiently corroborated to comply with the requirements of sub-sec. 2 of sec. 1003, and whether he was right in holding that there was sufficient evidence to justify his finding the prisoner guilty:—

Held, that the evidence of the child was sufficiently corroborated by: (a) evidence of the statement made to her mother within an hour or two after the occurrence—a statement volunteered by her, and not extracted by interrogation or suggestion; (b) evidence of the condition of the child's clothing, as testified to by her mother and two other persons; (c) evidence of the fact of the child having been with the prisoner during the time testified to as that during which his improper conduct took place.

(2) That there was reasonable evidence on which, if believed, the defendant might be found guilty of the offence charged. *Rex v. Bowes*, 111.

3. *Certiorari*—*Status of Prosecutor as Applicant*—*Identification with Crown*—*Rules of Court*—*Recognizance*—*Time for Moving*—*Magistrates' Order for Payment of Costs by Prosecutor*—*Warrant for Arrest*—*Jurisdiction*.]—Rules 1279 *et seq.*, made by the Supreme Court of Judicature for Ontario on the 27th March, 1908, pursuant to

secs. 576 and 1126 of the Criminal Code, requiring, among other things, a recognizance or deposit in all cases in which it is desired to move to quash a conviction, order, warrant, or inquisition, do not apply where the prosecutor is moving for a *certiorari*; the prosecutor in effect moves on behalf of the Crown, and the Crown is not bound by the Rules, not being expressly named.

Where magistrates, having dismissed a complaint under the Indian Act, ordered that the costs should be paid by the prosecutor; and a warrant was issued by one of the magistrates for the arrest of the prosecutor and for his imprisonment for thirty days unless the costs were sooner paid:—

Held, that the prosecutor was entitled to a *certiorari* to remove the order and all the proceedings into the High Court, although he had not given security by recognizance or deposit, and the application was not made within six months, as required by the Rules.

Order of *BRITTON, J.*, reversed. *Re Martin and Garlow*, 295.

4. *Conspiracy*—*Trade Combination*—*Criminal Code, sec. 498*—*Restraint of Trade*—*Prevention of Competition*—*Evidence*—*Bona Fides*—*Wholesale Grocers' Guilds*—*Protection of all Wholesale Dealers*—*Fixing of Prices*.]—The defendants, the Dominion Wholesale Grocers' Guild, the Ontario Wholesale Grocers' Guild, and certain individuals carrying on the business of wholesale grocers, were indicted, under sec. 498 of the Criminal Code, for conspiring, combining, agreeing and arranging one with the other and others of them, and with other persons, to restrain and injure trade and commerce in relation to sugar, tobacco,

starch, and other articles and commodities, the subject of trade and commerce (sub-sec. (b) of sec. 498), and also unduly to prevent, etc., as in sub-secs. (c) and (d).

The defendants elected to be tried without a jury, and the trial Judge found the facts to be:—

(1) The defendants have not, nor have any of them, intended to violate the law.

(2) Nor have they, nor have any of them, intended maliciously to injure any persons, firms, or corporations, nor to compass any restraint of trade unconnected with their own business relations.

(3) They have been actuated by a *bonâ fide* desire to protect their own interests, and those of the wholesale grocery trade in general.

(4) As far as intention and good faith or the want of it are elements in the offence with which they are charged, the evidence is entirely in their favour.

And *held*, upon the evidence, and the authorities reviewed in the judgment, that the defendants were not guilty of a breach of the law.

The elements which distinguished this case from *Rex v. Elliott* (1905), 9 O.L.R. 648, were: (a) that the endeavour of the Wholesale Grocers' Guilds was to protect the interest and welfare of the wholesale grocers of Canada, whether they were members of the guilds or not; and (b) that the prices were in all cases fixed by the manufacturers.

It would be dangerous to accept as a settled doctrine of political economy or proposition of law, that, under any and all conditions and at all times, every man or corporation should be declared to have an absolute and inalienable right to buy and sell, trade or

barter, with any other person or corporation, without restriction as to quantity or price. *Rex v. Beckett et al.*, 401.

5. *Evidence — Statements of Prisoner Charged with Murder to Person in Authority — Admissibility—Negating Threats or Inducements — Warning — Sufficiency.*—The prisoner, a foreigner charged with murder, was placed under arrest and taken to the police station, where the policeman in charge instructed an interpreter to tell the prisoner that, in view of any charge that might be brought against him, he need not answer anything unless he liked, but anything he said would be used in evidence against him. This was all that the policeman told the interpreter to say to the prisoner, and the interpreter told the prisoner exactly what he had been told to tell him. At the trial of the prisoner evidence was given, without objection, of statements made by him in answer to questions put to him by the policeman, through the interpreter, after this warning. There was no negation in terms of the absence of threats or promises or inducements, but apparently all that actually took place was related. The trial Judge was satisfied that the statements were not made under the influence of threats or promises or inducements made or held out to the prisoner:—

Held, that the evidence of the prisoner's statements was properly admitted; there was no necessity for a direct affirmation by the witnesses that no threats or promises or inducements were made or held out.

The Queen v. Thompson, [1893] 2 Q.B. 12, 17 Cox C.C. 641, distinguished.

Held, also, that it is not necessary in warning or cautioning a prisoner that a constable should say to him everything that is set forth in sec. 684 (2) of the Criminal Code. *Rex v. Steffoff*, 103.

6. *Magistrate's Conviction under Repealed Statute—Attempt to Sustain under Different Statute.*—The defendant was prosecuted before a police magistrate for a breach of the provisions of sec. 415 of the Railway Act of Canada, R.S.C. 1906, ch. 37, and on the evidence was found guilty of the offence as charged. No amendment was asked for, and a conviction was recorded on the charge as laid. Subsequently the magistrate discovered that sec. 415 had been repealed, and he thereupon, by virtue of 8 & 9 Edw. VII. ch. 9, sec. 2 (schedule), amending sec. 1014 of the Criminal Code, reserved for the opinion of the Court of Appeal the question whether the conviction should be allowed to stand under sec. 283 of the Criminal Code:—

Held, that the conviction could not be sustained under a different statute. *Rex v. Corrigan*, 99.

7. *Permitting Young Girls to be on Premises for Purposes of Fornication—Criminal Code, sec. 217—"Unlawfully."*—The defendant invited or induced or knowingly suffered two girls, under the age of eighteen, to be upon his premises for the purpose of being, as they were, carnally known by him and another:—

Held, that he was properly found guilty of an indictable offence under sec. 217 of the Criminal Code.

The word "unlawfully," in the expression "unlawfully and carnally known," in sec. 217, does

not import that the unlawful carnal connection must be something of a character elsewhere declared to be unlawful and penalised by the Code or by some other definite law or the general law of the land; the word is used, in describing the act penalised, in the sense of not sanctioned or permitted by law, and as distinguished from acts of sexual intercourse which are not regarded as immoral. *Rex v. Karn*, 91.

8. *Perjury—Evidence of Proceeding in which Perjury Committed—Necessity for Production of Information—Defect in Proof—Objection not Taken till Close of Case.*—The defendant was indicted for perjury alleged to have been committed at a preliminary examination before a police magistrate of a charge of perjury against W.:—

Held, that, the proceeding against W. having been commenced by information, the proceeding should have been proved, at the trial of the defendant, by production of the information; and, that not having been done, the proceeding was not proved by the evidence of the magistrate and of a stenographer who took down the testimony adduced before the magistrate; and the case against the defendant was properly withdrawn from the jury, although objection was not taken to the defect in the proof until the close of the case for the Crown; *MERE-DITH*, J.A., dissenting.

Rex v. Drummond (1905), 10 O.L.R. 546, *Rex v. Le Gros* (1908), 17 O.L.R. 425, and *Regina v. Dillon* (1877), 14 Cox C.C. 4, followed. *Rex v. Farrell*, 182.

9. *Vagrancy—Criminal Code, sec. 238 (l)—Gaming—Betting.*—The defendant, being charged with

vagrancy, admitted that he made his living, for the most part, by betting on horse races in the streets, having no fixed place for taking bets or paying them:—

Held, that he could not, upon this admission, be convicted as a vagrant under sec. 238 (l) of the Criminal Code.

“Gaming” in clause (l) does not include betting. *Rex v. Ellis*, 218.

See APPEAL, 2—LIQUOR LICENSE ACT.

CROWN.

See CRIMINAL LAW, 3—QUIETING TITLES ACT.

DAMAGES.

Assessment by Jury—Personal Injuries—Quantum—Loss of Business Profits—Severance—Evidence—Remoteness—Amount of Damages Assessed Reduced on Appeal.]—The plaintiff, a married woman, was injured while a passenger on one of the defendants’ cars, by reason of the negligence of the defendants’ servants, as found by a jury, who assessed her damages at \$1,900 for her injuries and \$600 for loss of business. The separation of the two items was made by the jury, and the Judge entered judgment for \$2,500:—

Held, notwithstanding the form of the judgment, that the Court was enabled, by the division made by the jury, to consider the propriety of the allowance made for loss of profits.

The plaintiff was fifty-six years old, and was in business as a baker. After her injury she sold the business. Some evidence was given as to profits being earned in the business at the time of the injury, but there was nothing to shew a reasonable certainty of future profits:—

Held, that the allowance for loss of profits was not supportable, the alleged damages being remote and conjectural, and the judgment should be varied by reducing the amount to \$1,900.

Held, as to the \$1,900, that the amount was not so large as to shew that the jury neglected their duty or were actuated by any improper motive or did not appreciate the grounds on which they might act in awarding damages.

Judgment of BRITTON, J., varied. *Wright v. Toronto R.W. Co.*, 498.

See COMPANY, 2 — LANDLORD AND TENANT, 3—PARTIES—PARTNERSHIP, 2.

DEATH.

See QUIETING TITLES ACT—WILL.

DIRECTORS.

See COMPANY, 2, 4, 5.

DISMISSAL OF SERVANT.

See MASTER AND SERVANT.

DISTRESS.

See LANDLORD AND TENANT, 1, 3.

DISTRIBUTION OF ESTATES.

See WILL.

DISTRICT COURT.

See APPEAL, 3.

DIVISION COURTS.

Jurisdiction—Splitting Cause of Action—Money Lent—Separate Loans—R.S.O. 1897, ch. 60, sec. 79.]—The plaintiff lent sums of money to the defendant on five different days, all within a short

period. Each of the amounts was advanced as a separate and distinct loan, without any reference to a further advance or loan of any kind, and upon the defendant's promise to pay in each instance, and with an offer to give his promissory note for each sum, if desired. The plaintiff brought two actions in a Division Court to recover the money lent: the first for two of the sums lent, amounting together to \$70; the second for the other three sums, amounting to \$100:—

Held, not a dividing of a cause of action into two actions for the purpose of bringing the same within the jurisdiction of a Division Court, which is forbidden by sec. 79 of the Division Courts Act, R.S.O. 1897, ch. 60.

Re Gordon v. O'Brien (1886), 11 P.R. 287, and *Re Clark v. Barber* (1894), 26 O.R. 47, distinguished.

The King v. Sheriff of Herefordshire (1831), 1 B. & Ad. 672, followed. *Re McKay v. Clare*, 344.

DIVISIONAL COURT.

See APPEAL, 3, 4—COSTS—EVIDENCE—LIQUOR LICENSE ACT—TRUSTS AND TRUSTEES.

ELECTION.

See CHARGE ON LAND—CONTRACT, 5.

ELECTRIC ENERGY.

See CONSTITUTIONAL LAW.

ELECTRIC RAILWAY.

See COMPANY, 2—STREET RAILWAYS.

ENGINEER.

See APPEAL, 4.

EQUITABLE ASSIGNMENT.

See COMPANY, 4.

EQUITABLE RELIEF.

See INFANT.

ESCHEAT.

See QUIETING TITLES ACT.

ESTATE.

See WILL.

ESTOPPEL.

See COMPANY, 5 — INFANT — PARTNERSHIP, 1 — QUIETING TITLES ACT.

EVIDENCE.

Admission of Fresh Evidence by Divisional Court on Appeal—Con. Rule 498—Materiality—Conclusiveness—Remissness in not Adducing Evidence at Trial—Mistake in Books—Alteration of Order before Issue.—Where the order of a Court upon an appeal has not been issued, the appeal is still pending and within the control of the Court, and the Court is at liberty, of its own motion or on application, to recall the opinion which has been pronounced, and, on a proper case, to admit further evidence for the purpose of the appeal, under Con. Rule 498.

The rule which governs the admission of new evidence upon appeal is fenced round with strict limitations. There must be no remissness in adducing all possible evidence at the trial; the new evidence must be practically conclusive; merely corroborative evidence, evidence to admit which would be merely setting oath against oath, evidence obtained under suspicious circumstances, or evidence which might merely en-

able an opponent's witness to be cross-examined more effectively, will not do; as a rule, the evidence must be of some fact or document essential to the case, of the existence or authenticity of which there is no reasonable doubt, or no room for serious dispute.

Young v. Kershaw (1899), 81 L.T.R. 531, and *Murray v. Canada Central R.W. Co.* (1882), 7 A.R. 646, specially referred to.

After an order had been pronounced by a Divisional Court reversing the judgment in the plaintiff's favour of an Official Referee in an action to enforce a mechanic's lien, but before the order had issued, the plaintiff applied for leave to adduce fresh evidence to shew that, by a mistake of his book-keeper, certain items in respect of materials furnished had been charged as extras, whereas in fact the materials had been furnished under the contract. The Divisional Court allowed the evidence to be given, and, although it had always been in the possession of the plaintiff, there being no suspicion of bad faith, credited it, recalled the order pronounced, and substituted an order affirming the judgment of the Referee—the evidence being conclusive upon the question involved in the appeal:—

Held that the discretion of the Court was properly exercised.

Order of a Divisional Court, 19 O.L.R. 428, affirmed. *Rathbone v. Michael*, 503.

See CRIMINAL LAW, 1, 2, 5, 8—DAMAGES.

EXCESSIVE DISTRESS.

See LANDLORD AND TENANT, 3.

EXECUTION.

See APPEAL, 5—CONTRACT, 4.

EXECUTORS.

See VENDOR AND PURCHASER.

EXEMPTION.

See ASSESSMENT AND TAXES, 2, 3.

EXPROPRIATION.

See RAILWAY, 3.

FACTORIES.

See ASSESSMENT AND TAXES, 3.

FIRE ESCAPE.

See INNKEEPER.

FORNICATION.

See CRIMINAL LAW, 7.

FRAUD.

See INFANT.

FURNISHED HOUSE.

See LANDLORD AND TENANT, 2.

GAMING.

See CRIMINAL LAW, 9.

HABEAS CORPUS.

See LIQUOR LICENSE ACT.

HIGHWAY.

See MUNICIPAL CORPORATIONS, 1—NEGLIGENCE, 1.

HYDRO-ELECTRIC POWER COMMISSION.

See CONSTITUTIONAL LAW.

ILLEGAL DISTRESS.

See APPEAL, 1.

INCEST.

See CRIMINAL LAW, 1.

INFANT.

Contract—Fraudulent Representation as to Age—Benefit Obtained dehors the Contract—Equitable Relief—Estoppel.]—The judgment of MULOCK, C.J.Ex.D., 19 O.L.R. 1, affirmed. *Jewell v. Broad*, 176.

See INSURANCE, 2 — NEGLIGENCE, 2—WILL, 3.

INFORMATION.

See CRIMINAL LAW, 8.

INNKEEPER.

Neglect to Provide Fire Escape in Bed-room—Death of Guest in Fire—Evidence as to Cause—Liability—Statutory Duty—Penalty—R.S.O. 1897, ch. 264, secs. 3, 6.]—In an action by the widow of H. to recover damages for his death by reason of the negligence or default of the defendant, it appeared that H. was a guest in the defendant's hotel, and was in bed at night in a bed-room not provided with a fire escape, as required by sec. 3, subsec. 1, of "An Act for the Prevention of Accidents by fire in Hotels and other Like Buildings," R.S.O. 1897, ch. 264, when a fire broke out; the fire completely destroyed the floorings of the hotel building, and H.'s body was found in the basement, but not under the room which he had occupied:—

Held, that the evidence warranted the conclusion that the absence of a fire escape compelled H. to seek some other means of escape, and that in the effort he lost his life; and thus the defendant's failure to perform his statutory duty was the direct cause of the death.

Held, also, that the object of the Act is to benefit the occupants of hotels and other buildings; and the plaintiff's cause of action arising from the breach of the statutory duty was not taken away by reason of the provision in the Act (sec. 6) that the proprietor of an hotel shall, on summary conviction for neglect to observe any of the provisions of the Act, incur a fine, no portion of which goes to the injured person or his family.

Gorris v. Scott (1874), L.R. 9 Ex. 125, and *Groves v. Wimborne*, [1898] 2 Q.B. 402, followed. *Hagle v. Laplante*, 339.

See MUNICIPAL CORPORATIONS, 3.

INSURANCE.

1. *Accident Insurance—Disability—Payment of Claim for Short Period—Receipt—Injuries Subsequently Developing from same Accident—Permanent Disability—Terms of Policy—Liability Confined to one Claim.*]—An accident insurance policy was issued by the defendants to the plaintiff, and was in force on the 3rd September, 1907, when the plaintiff was injured in a railway accident. Provision was made in the policy for the payment of varying amounts depending upon the nature and extent of the injury. On the 17th December, 1907, the plaintiff, believing that he would speedily recover from the effect of his injury, sent in a claim for eight weeks' total and four weeks' partial disability. The claim was admitted by the defendants, and they at once sent the plaintiff a cheque for \$425, which he accepted. He signed a receipt for the \$425. "in final settlement of my claim, including double liability, under

policy No. 64276, for injuries received on the 3rd day of September, 1907, and I hereby acquit and discharge the (defendants) from all and any further claims under said policy which I have or may hereafter have as a result of said injuries." The plaintiff on the 9th October, 1908, made a claim for permanent disability arising from the same railway accident, the defendants first having had notice of this on the 18th June, 1908; and this action was brought to recover the amount of that claim. Being examined as a witness, the plaintiff admitted that in making the settlement of December, 1907, he intended to make and believed he was making a full and final settlement of all claims against the defendants arising out of the accident. He believed that he had substantially recovered from its serious consequences, and that, if he had continued to recover as he was recovering when he received the cheque, there would have been nothing further about it. He said he did not read the receipt which he signed, and in this he was believed by the trial Judge.

Some of the terms of the policy were: that the defendants should not be liable for more than one claim on account of any one accident; that the entire amount payable to and claimed by the assured should be ascertained and admitted before any part thereof was paid; that the amount so paid should be in diminution of the total amount insured in case of a subsequent claim in the same year; and that notice of the injury should be given within twenty-one days after the accident, and particulars of the claim sent within two months of the time when

the same became a claim within the meaning of the policy:—

Held, MEREDITH, J.A., dissenting, that the plaintiff was not entitled to recover.

Judgment of CLUTE, J., reversed. *Kent v. Ocean Accident and Guarantee Corporation*, 226.

2. *Life Insurance—Will—Appointment of Trustee to Receive Moneys for Infant Children—Payment to Trustee—Discharge of Insurers — Inconsistent Duties of Trustee—Breach of Trust—R.S.O. 1887, ch. 136, sec. 11.*—The testatrix by her will appointed her husband executor thereof and also trustee to receive all moneys payable under policies on her life, describing them, and including two issued by the defendants, all of which she declared to be for the benefit of her children. She devised and bequeathed to her husband all her real and personal estate, and directed that such estate, including all moneys accruing from the policies of life insurance, was to be held by her husband upon trust, first to pay her debts and funeral and testamentary expenses, and second to invest and apply the income for the benefit of the children and divide the corpus among them when the youngest should attain majority, etc. The defendants paid the amounts of their two policies (which on their face were payable to the children) to the husband as "executor of will, trustee of minor children, and administrator of estate" of the testatrix. By the statute then in force, R.S.O. 1887, ch. 136, sec. 11, the insured may by will appoint a trustee of the money payable under a policy, and payment made to such trustee shall discharge the insurers:—

Held, that there was no breach

of trust in making payment to the private trustee named in the will, who was also a statutory trustee to give a discharge, and the defendants could not be regarded as participants in any breach of trust afterwards committed by the husband; and this notwithstanding the inconsistency of the duties imposed upon the husband, the will directing that payment of debts should be made in part out of these insurance moneys, while the statute exempted them from the payment of debts.

Scott v. Scott (1890), 20 O.R. 313, distinguished.

Campbell v. Dunn (1892), 22 O.R. 98, *Dodds v. Ancient Order of United Workmen* (1894), 25 O.R. 570, and *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, 153, followed.

Judgment of *MACMAHON, J.*, affirmed. *Dicks v. Sun Life Assurance Co.*, 369.

See LANDLORD AND TENANT, 1—MECHANICS' LIENS, 1.

INTEREST.

See CHARGE ON LAND—RAILWAY, 3.

JOINT CONTRACTORS.

See CONTRACT, 3.

JOINT TENANTS.

See WILL, 1.

JUDGMENT.

See APPEAL, 5—ASSESSMENT AND TAXES, 3—COMPANY, 4—CONTRACT, 3—EVIDENCE—RAILWAY, 2.

JUDICIAL COMMITTEE OF PRIVY COUNCIL.

See APPEAL, 5.

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JURISDICTION.

See APPEAL, 2, 3—CRIMINAL LAW, 3—DIVISION COURTS—RAILWAY, 3—TRUSTS AND TRUSTEES—WRIT OF SUMMONS.

JURY.

See DAMAGES—NEGLIGENCE, 3—RAILWAY, 2—STREET RAILWAYS, 2.

LANDLORD AND TENANT.

1. *Assignment by Tenant for Benefit of Creditors—Rent in Arrear—“Preferential Lien”—R.S.O. 1897, ch. 170, sec. 34 (1)—Destruction by Fire of Goods Subject to Distress—Lien on Insurance Moneys in Hands of Assignee.*—Two days after an assignment to the defendant by M. for the benefit of his creditors, under the Assignments and Preferences Act, the goods in the possession of the assignee upon premises demised by the plaintiff to M. were destroyed by fire. The goods were insured by M., and the policies had been assigned to the defendant. At the date of the assignment M. was indebted to the plaintiff for rent in the sum of \$626.38, \$300 of which had accrued due within one year prior to the date of the assignment (R.S.O. 1897, ch. 170, sec. 34 (1)). From the goods destroyed the plaintiff could, by distress, at or before the date of the assignment, have made the whole of the rent due:—

Held, that the plaintiff was not entitled to a “preferential lien”—the expression used in sec. 34 (1)—upon the insurance moneys paid to the defendant in respect of the goods destroyed.

In re McCracken (1879), 4 A.R. 486, and *Lazier v. Henderson* (1898), 29 O.R. 673, distinguished.

Chew v. Traders Bank of Canada (1909), 19 O.L.R. 74, specially referred to.

Judgment of BOYD, C., reversed. *Miller v. Tew*, 77.

2. *Lease of Furnished House—Unsanitary Condition—Right of Tenant to Repudiate Tenancy—Remedying Defects—Findings of Fact Made by Trial Judge—Reversal on Appeal.*—Upon the letting of a furnished house, there is an implied undertaking that the house is reasonably fit for habitation; and if from any cause this is not the case, the tenant is justified in repudiating the tenancy. This is quite irrespective of any representation by the lessor; if the lessor makes a representation that the house is fit for habitation, he is not relieved from the effect of that representation by the fact that he honestly believed in the truth of it. The house must be so reasonably fit for habitation at the time of the beginning of the term; and the lessor has no right to be allowed after that time to put the house in the condition it should have been in.

Wilson v. Finch-Hatton (1877), 2 Ex.D. 336, and *Charsley v. Jones* (1889), 53 J.P. 280, followed.

A Divisional Court disagreed with the findings of fact of CLUTE, J., at the trial, as to the condition of a house let furnished by the plaintiff to the defendant, and, being of opinion that the house when let was in such an unsanitary condition as to justify the defendant in leaving it, allowed an appeal from the judgment at the trial in favour of the plaintiff, and dismissed an action for damages for breach of the covenants in the lease.

In shewing the unsanitary con-

dition of a house, it is not necessary to prove that the condition was such that it caused illness.

Beal v. Michigan Central R.R. Co. (1909), 19 O.L.R. 502, and *Ryan v. McIntosh* (1909), 20 O.L.R. 31, referred to as to the principles to be adopted upon an appeal from the findings of fact made by a trial Judge. *Gordon v. Goodwin*, 327.

3. *Lease of Hotel—Rent—Proviso for Rebate—Distress for Rent Reserved without Making Rebate—Tenant's Remedy—Replevin—Action on Covenant—Excessive Distress—Relief as to Rebate—Money Paid into Court—Counterclaim for Rent—Damages for Holding over—Reference—Costs.*—A lease of hotel premises contained a proviso that, in a certain event (which happened), the lessors should make a reasonable rebate in the rent which the lessee covenanted to pay. Notwithstanding that an action was pending for a declaration as to the rebate which should properly be allowed, the defendants (the lessors) distrained the goods of the plaintiff (the lessee) in the hotel, and the plaintiff brought this action, for replevin and other relief, paying into Court the amount of the rent in question:—

Held, that the defendants' covenant to make the rebate did not directly affect the reservation of rent; the rebate was to be made by the defendants from time to time, and for their refusal to make it the lessee's remedy was by action for breach of covenant; and, therefore, so far as the action was founded on replevin, it failed, the rent not having been tendered before the distress.

Bickle v. Beatty (1859), 17 U.C. R. 465, specially referred to.

But *held*, that the plaintiff was entitled to damages for excessive distress, the value of the goods distrained being wholly out of proportion to the rent distrained for.

Quere, whether any cause of action had arisen for breach of covenant for not making a reasonable rebate in respect of the rent distrained for, the rent not having been paid or tendered before the distress; but this it was not necessary to determine, as any relief to which the plaintiff might be entitled in respect of the rebate could be administered under Con. Rules 1069 and 1072 in dealing with the money which had been paid into Court.

Held, that on their counterclaim the defendants were entitled to recover the rent accrued due under the lease, subject to the rebate as ascertained in the former action; but their claim for double the yearly value for holding over certain rooms outside the hotel was disallowed, the agreement being that the plaintiff was to hold them during the term of the lease of the hotel.

A reference was directed; and the plaintiff was allowed the costs of the action except as to his claim in replevin; the defendants were allowed no costs of the action or counterclaim, their conduct having been harsh and unreasonable. *Hessey v. Quinn*, 442.

See NEGLIGENCE, 3.

LEGACY.

See VENDOR AND PURCHASER—WILL.

LEGISLATURE.

See CONSTITUTIONAL LAW.

LICENSEE.

See RAILWAY, 2.

LIEN.

See LANDLORD AND TENANT, 1—MECHANICS' LIENS.

LIFE INSURANCE.

See INSURANCE, 2.

LIMITATION OF ACTIONS.

See CHARGE ON LAND—QUIETING TITLES ACT—VENDOR AND PURCHASER—WILL, 1.

LIQUOR LICENSE ACT.

*Conviction for Second Offence—Amendment of sec. 72 after First Conviction—Change in Penalty—Interpretation Act, sec. 7, clause 46 (d)—Refusal of Judge to Discharge Prisoner—Right of Appeal to Divisional Court—Proof of Previous Conviction—Statutory Procedure—Violation by Magistrate—Liquor License Act, sec. 101.]—Notwithstanding the provisions of secs. 1 and 6 of R.S.O. 1897, ch. 83, and of the Liquor License Act, R.S.O. 1897, ch. 245, sec. 121, there is a right of appeal to a Divisional Court of the High Court from an order of a Judge of the High Court, made on the return of a *habeas corpus* and *certiorari* in aid, refusing to discharge a prisoner confined under a conviction as for a second offence of selling liquor without a license, contrary to the Liquor License Act.*

The prisoner was first convicted on the 28th July, 1908. In 1909, by sec. 12 of 9 Edw. VII. ch. 82, sec. 72 of the Liquor License Act was amended by increasing the penalty for a first offence. The conviction for the second offence was made after the amendment:—

Held, by CLUTE, J., and by a Divisional Court on appeal, that, having regard to the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7,

clause 46 (d), the offence for which the prisoner was convicted was a second offence within the statute, notwithstanding the amendment.

But *held*, by the Divisional Court, that the convicting magistrate, in inquiring as to the previous conviction, had not followed the procedure indicated by sec. 101 of the Liquor License Act; and the prisoner must be discharged. *Rex v. Teasdale*, 382.

LITERARY WORK.

See CONTRACT, 1.

LOCAL BOARD OF HEALTH.

See PUBLIC HEALTH ACT.

LOCAL OPTION BY-LAW.

See MUNICIPAL CORPORATIONS, 2.

LOSS OF PROFITS.

See DAMAGES.

MANDAMUS.

See ASSESSMENT AND TAXES, 3.
—PUBLIC HEALTH ACT.

MANUSCRIPT.

See CONTRACT, 1.

MASTER AND SERVANT.

1. *Dismissal of Servant—Justification — Confidential Relationship — Domestic Duties — Immoral Conduct.*—The plaintiff was employed by the defendant to assist him in his business of sheep-raising; the plaintiff lived in a house owned by the defendant near the defendant's dwelling-house, and, during the defendant's frequent absences, was left in charge of the business; at such

times he was often in the defendant's house, of which the defendant's wife and daughter and other children and a maid servant were inmates. The plaintiff, having been so employed for six or seven years, was re-engaged for a year from the 12th February, 1908, but was discharged by the defendant in July of that year. The reason for the dismissal was that the plaintiff had in June boasted to him (the defendant) of indecent and immoral conduct, occurring some years before, and had previously made the same statement to a neighbour, who communicated it to the defendant:—

Held, that the dismissal was justified; and the fact that the indecent conduct was an isolated act, occurring several years before, was not an exculpation, the defendant's knowledge being recent.

Seemle, per BOYD, C., that in the case of household servants, or those who have access freely to the household, any moral misconduct (not of trivial character) will justify dismissal.

Review of the authorities.

Judgment of the County Court of Middlesex reversed. *Denham v. Patrick*, 347.

2. *Injury to Servant—Negligence of Fellow Servant*—"Person having the Charge or Control of an Engine or Machine upon a Railway"—*Workmen's Compensation for Injuries Act*, sec. 3 (5).—An overhead crane in the defendants' factory, operated by electric power, was used to raise and move heavy castings from place to place. M., the man who operated the crane, sat in a cage which ran upon rails, and from it he regulated the movement of the crane; when the

crane was brought to the place where it was to be used, it was lowered and raised according to the direction of the foreman, who stood on the ground below, near the casting which was to be moved. The crane had been in use where the plaintiff, a foreman moulder, was working, and he had told M. that he did not require it any more, and, while M. was moving it away, it was raised above the plaintiff's head, the cable parted, and a heavy hook attached to the cable fell and injured the plaintiff. In an action to recover damages for the injuries sustained, the jury found that the injuries were caused by the negligence of M. in hoisting the hook and the sheaf of the crane over the plaintiff's head and letting it come in contact with the drum or something unknown, thereby breaking the cable:—

Held, that M. was a person having the charge or control of an engine or machine upon a railway or tramway, within the meaning of clause 5 of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160; and the defendants were answerable for his negligence.

Clause 5, as it now stands, is much wider in its scope than as it stood in the first Ontario Act, 49 Viet. ch. 28.

Murphy v. Wilson (1883), 44 L.T.N.S. 788, distinguished. *McLaughlin v. Ontario Iron and Steel Co.*, 335.

See NEGLIGENCE, 3.

MASTER IN CHAMBERS.

See COSTS.

MECHANICS' LIENS.

1. *Building Contract—Progress Estimates—Architect's Certificate—*

*Condition Precedent—Certificate Given after Action Begun—Default in Guaranteeing Performance of Contract—Refusal to Make Payments—Discontinuance of Work on Building—Insurance Premiums—Payment by Contractor—Delay in Completing Work—Extent of Lien—Amount Due under Contract—Mechanics' and Wage Earners' Lien Act, secs. 4, 9—Percentage Retained—Lien not Presently Enforceable—Right to Apply—Surplus Proceeds of Sale.]—*Work was done and materials supplied by the plaintiffs for the defendants in connection with the building of an hotel, under a written contract dated the 26th June, 1907. The plaintiffs undertook to complete the work, to the satisfaction of an architect, in accordance with specifications and drawings and with the conditions of the agreement, for \$115,000, which the defendants were to pay as the work progressed in monthly payments representing 85 per cent. of the amount of the work done and materials supplied, and for this percentage the architect was to issue progress estimates each month, on which payments were to be made, and the final payment was to be made on the expiration of thirty-one days after the plaintiffs had fulfilled the agreement. Payments were to be made only upon the written certificates of the architect that they were due. The plaintiffs were to complete and have ready for occupation by the 1st January, 1908, the first and second flats and part of the basement; to complete the remainder, except the outside finishing, by the 1st April, 1908; and to complete the whole by the 15th May, 1908. A large amount of the work was done, and nine progress estimates, the last dated the 1st June,

1908, were given by C., acting for the architect, amounting to \$57,-533.36. The amounts mentioned in five of these certificates were paid by the defendants, and a portion of the sixth; the defendants refused to make any further payments, on the ground that the plaintiffs were in default in not procuring and delivering to the defendants a bond guaranteeing the performance of the contract, which, by the contract, the plaintiffs undertook to do within fifteen days from the date of the contract. The plaintiffs thereupon stopped work on the building, and on the 14th July, 1908, brought this action to recover the amount alleged to be due to them for all work done and materials supplied by them, and to enforce their lien therefor under the Mechanics' and Wage Earners' Lien Act. Pending the action and on the 19th July, 1909, ten days before the trial, the architect gave the plaintiffs another progress estimate in which he estimated the cost of the work to the date of the estimate at \$64,-263.49:—

Held, that the defendants' refusal to make further payments was not justifiable, nor were the plaintiffs justified in discontinuing work. The plaintiffs were not entitled to be paid anything but the sums for which the architect had given them progress estimates; and were not entitled, in this action, to recover for the amount of the estimate of the 19th July, 1909.

By clause 13 of the contract provision was made for the payment of insurance premiums by the defendants during the progress of the work, but at the cost and expense of the plaintiffs, until the completion of the basement and the first and second flats,

which were to have been, but were not, completed by the 1st January, 1908, but the defendants were to pay the cost and expense of the insurance from and after the 1st January, 1908:—

Held, that the plaintiffs were not chargeable with the amount paid by the defendants for fire insurance on the building subsequent to the 1st January, 1908.

It was contended that under sec. 4 of the Mechanics' and Wage Earners' Lien Act the lien was given in respect of the work or service performed and the materials furnished, and that for the value of these, after deducting the payments made, the plaintiffs were entitled to a lien, irrespective of the terms of the contract and the conditions as to payment:—

Held, having regard to the provisions of secs. 4 and 9, that the terms of the contract could not be disregarded; and the plaintiffs were not entitled to payment on a *quantum meruit*.

Nor did the mere failure of the defendants to pay the amount which the plaintiffs were entitled to present payment of in respect of the progress estimates, entitle the plaintiffs to claim present payment of the percentage to be retained until the final completion and to enforce their lien for that percentage.

The judgment should provide that any surplus realised by sale after payment of the sums directed to be paid out of the proceeds of the sale, should remain in Court subject to further order; and should reserve leave to the plaintiffs to apply in respect of their lien, if any, for work done or materials furnished for which payment was not provided for by the judgment.

Judgment of the Local Master at

Kenora varied. *Kelly v. Tourist Hotel Co.*, 267.

2. *Material-man—Preservation of Lien—Last Delivery—Articles Used for Temporary Purpose—Contract—Registry of Lien—Time—Acceptance and Discounting of Promissory Note—Mechanics' and Wage Earners' Lien Act*, secs. 4, 22 (2), 28.]—The lien of a material-man under the Mechanics' and Wage Earners' Lien Act is for materials furnished to be used in the building (sec. 4); and where the plaintiffs had contracted to supply the hardware for use in the construction of a building, and the last delivery was of certain bolts of trifling value, and used for a temporary or experimental purpose only:—

Held, that the delivery was under the contract, and that the lien for all the materials supplied was preserved by registry of the claim therefor within thirty days from the delivery of the bolts, although, if that had not been regarded, the registry would have been too late: sec. 22 (2).

Rathbone v. Michael (1909), 19 O.L.R. 428, distinguished.

Held, also, *MAGEE, J.*, dissenting, that, having regard to sec. 28 of the Act, the material-men had not lost their lien by accepting from the contractors, in part payment of their account, a promissory note which they discounted with their bankers, and which had come back into their hands unpaid prior to the registry of their claim of lien.

Edmonds v. Tiernan (1892), 21 S.C.R. 406, distinguished. *Brooks-Sanford Co. v. Theodore Telier Construction Co.*, 303.

MEDICAL PRACTITIONER.

See PUBLIC HEALTH ACT.

MINES AND MINERALS.

Patentees of Mining Rights—Owners of Surface Rights—Roadway from Mines—Right of User—Right to Search for Minerals—Townsite—Streets and Lots—Plan—"Located"—R.S.O. 1897, ch. 36, sec. 42—Compensation—7 Edw. VII. ch. 18, secs. 23, 24 (O.)—The plaintiffs, by virtue of letters patent from the Crown in 1905, and mesne conveyances, were the owners of the mines, minerals, and mining rights in, upon, and under the whole of mining claim J.B. 6, consisting of 40 acres, and, by virtue of a deed of transfer from the Temiskaming and Northern Ontario Railway Commissioners and mesne conveyances, were the owners in fee simple of a part of claim J.B. 6, described as lot 42. Claim J.B. 6 had, before these actions, become part of the townsite of Cobalt. The plaintiffs' mining works and buildings were on lot 42, and, in order to gain access with vehicles and teams to and from this portion of their property to the remaining parts of J.B. 6 and to and from Cobalt railway station, they constructed and used a roadway, which was the only route sufficient for the purposes of their business. The defendants, the town corporation and individuals owning surface rights in portions of J.B. 6 outside of lot 42, the title to which had been acquired subsequently to the acquisition of the plaintiffs' rights, sought to prevent the plaintiffs' further use of the roadway in so far as it crossed townsite lots, and to exclude the plaintiffs from searching for minerals in or upon the streets or townsite lots as laid out on J.B. 6:—

Held, that the title of the defendants was subject to all the rights expressed to be granted to

the plaintiffs by the letters patent of 1905. The lands had not then been granted or leased, and had not been "located," in the sense in which that word is used in sec. 42 of the Mines Act, R.S.O. 1897, ch. 36, and therefore that section was not applicable.

The streets and lots in the town-site had been delineated and shewn on a plan before the construction of the plaintiffs' roadway, but the plan was not properly recorded until after the issue of the letters patent to the plaintiffs' predecessors in title:—

Held, that the grant carried with it everything reasonably necessary to the proper enjoyment and use of the thing granted, including such convenient way or ways, or means of ingress and egress, as were required; the delineation on a plan of streets for the use of the town-dwellers could not conclude the question of what was reasonable as a way or means of access to the plaintiffs' works, which had been in operation before the preparation or recording of the plan; and, the plaintiffs' roadway being the only practicable way by which they could bring in what was required for the working of their mines and carry away their products, the defendants had no right to interfere with the reasonable use by the plaintiffs of that roadway for their necessary purposes.

Held, also, that the plaintiffs had the right to carry on their mining operations in; upon, or under the streets and highways of the town, but subject to the provisions of secs. 23 and 24 of 7 Edw. VII. ch. 18 (O.), and were entitled to the use and possession of the surface of the townsite lots owned or claimed by the individual defendants, so far as required to

enable them to prosecute their mining rights and privileges.

Judgment of BOYD, C., varied.
Coniagas Mines Limited v. Town of Cobalt, Coniagas Mines Limited v. Jacobson, 622.

See ASSESSMENT AND TAXES, 1, 4.

MISFEASANCE.

See COMPANY, 5.

MISREPRESENTATION.

See COMPANY, 2—INFANT.

MISTAKE.

See COMPANY, 6—EVIDENCE.

MONEY IN COURT.

See WILL, 3.

MONEY LENT.

See DIVISION COURTS.

MORTGAGE.

See CHARGE ON LAND.

MUNICIPAL CORPORATIONS.

1. *Agreement between Municipalities — Building and Maintenance of Highway—Right to Enforce—Absence of By-law and Corporate Seal—Payment of Money—Executed Contract—Taking Benefit—Recovery of Money Paid—Failure of Consideration.*—The plaintiffs, a township corporation, alleged an agreement with the defendants, the corporation of an adjacent township, that, in consideration of the plaintiffs opening and building a road through the plaintiffs' township to a point agreed upon in the boundary line between the two townships, and agreeing to maintain the same

thereafter as a public highway, the defendants would open and build and thereafter maintain a public road or highway, in continuation of the plaintiffs' road, through the defendants' township. The plaintiffs then alleged that, relying upon this agreement, they built their road, expending thereon large sums of money, but the defendants refused to build the continuation, without which the plaintiffs' road was useless; and they claimed specific performance of the agreement, a mandamus requiring the defendants to build the road, or damages.

There was no contract under seal or by-law of the defendants, but the plaintiffs relied on a resolution of the defendants' council authorising the building of the continuation of the road, upon condition of the plaintiffs contributing \$100 towards the cost, which the plaintiffs did:—

Held, that the plaintiffs were not entitled to specific performance, or to a mandamus, or to damages; for, assuming in their favour that an agreement was proved, in its nature within the proper competence of the defendants' council, and a performance to the extent alleged by the plaintiffs on their part, it was not a case where a contract had been fully executed by the plaintiffs of which the defendants had had the benefit, as in *Bernardin v. Municipality of North Dufferin* (1891), 19 S.C.R. 581; *Canadian Pacific R.W. Co. v. Township of Chatham* (1896), 25 S.C.R. 608; and *Lawford v. Billerica Rural District Council*, [1903] 1 K.B. 772.

The plaintiffs were *held* entitled to recover the \$100 paid, as upon a consideration which failed.

Judgment of MACMAHON, J.,

affirmed. *Township of East Gwillimbury v. Township of King*, 510.

2. *By-law Submitted to Electors—Voting on—Scrutiny of Ballot Papers by County Court Judge—Consolidated Municipal Act, 1903, sec. 371—Inquiry as to Right to Vote—Voters' Lists Act, 1907, sec. 24—Finality of List—Change of Residence after List Certified—Deducting Bad Votes—Duty of Judge—Prohibition.*—A County Court Judge holding, under secs. 369 and 371 of the Consolidated Municipal Act, 1903, a scrutiny of the ballot papers deposited at the voting upon a by-law submitted to the electors, has no authority to require any person who voted to state for whom he voted.

Upon such a scrutiny the Judge has, however, jurisdiction to enter upon an inquiry as to the right to vote of the persons who have voted; but that inquiry is limited, in view of the provisions for finality of sec. 24 of the Voters' Lists Act, 1907, as regards the right to vote of any person whose name is entered on the voters' list upon which the voting took place, to an inquiry as to whether, subsequently to the list being certified, he has become, by change of residence, disentitled to vote.

In re Local Option By-law of the Township of Saltfleet (1908), 16 O.L.R. 293, followed.

Semble, that, the jurisdiction of the County Court Judge being purely statutory, he has not the power to deduct the bad votes from the number cast in favour of the by-law, but his proper course is to certify the facts to the council.

Prohibition to the Judge of the County Court of Dufferin. *Re Orangeville Local Option By-law*, 476.

3. *Power to Regulate Victualling Houses—Consolidated Municipal Act, sec. 583 (34)—Sunday Closing By-law—Reasonable Restraint—Duty of Innkeeper.*—A city by-law providing that victualling houses shall be closed every Sunday from 2 p.m. till 5 p.m. and from 7 p.m. on Sunday till 5 a.m. on the following Monday, is within the powers of a city council under sec. 583 (34) of the Consolidated Municipal Act, 3 Edw. VII. ch. 19.

It is no undue interference with private rights and no undue restraint upon business to impose such regulations.

In re Campbell and City of Stratford (1907), 14 O.L.R. 184, followed.

It is the duty of innkeepers to furnish food for travellers, and they cannot relieve themselves of their obligation by insisting that restaurants or victualling houses shall remain open at all times. *Re Karry and City of Chatham*, 178.

See ASSESSMENT AND TAXES—CONSTITUTIONAL LAW—MINES AND MINERALS—PUBLIC HEALTH ACT.

MURDER.

See CRIMINAL LAW, 5.

NEGLIGENCE.

1. *Leaving Horses Unfastened and Unattended on Highway—Injury to Persons on Highway—Liability—Finding of Trial Judge—Appeal.*—It is not negligence *per se* to leave a horse standing in a highway unfastened and unattended; it is a question of fact for the jury or other trial tribunal whether the owner of the horse was negligent in so leaving him.

A pair of quiet horses attached to a waggon laden with hay were allowed to stand on a country road unfastened, the reins being thrown on the ground, while the driver attempted to adjust the load. The hay fell from the waggon, and the horses, being startled, ran away, overtook the plaintiffs, who were driving along the highway in a buggy, and injured them. The trial Judge (BRITTON, J.) found that the driver was not negligent, and a Divisional Court (TEETZEL, J., dissenting) affirmed his finding.

Illidge v. Goodwin (1831), 5 C. & P. 190, explained and distinguished.

Review of the authorities. *Ryan v. McIntosh*, 31.

2. *Sale of Air-gun to Minor—Injury to Person—Duty—Liability—Criminal Code, sec. 119.*—The defendants, who sold an air-gun to a boy of thirteen, were held liable to the plaintiff, who was injured by shot fired from the gun in the hands of the boy, for their negligence in selling it to a minor under sixteen: Criminal Code, sec. 119.

Dixon v. Bell (1816), 5 M. & S. 198, followed. *Fowell v. Grafton*, 639.

3. *Unsafe Premises—Injury to Servant of Lessees—Liability of Lessees as Occupiers—Lessor Entering to Do Work on Premises—Non-repair—Jury—Issue between Defendants—Pleading—Order for Trial—Necessity for.*—Lessees being in occupation of a building, the lessor came in to do some work, pursuant to an undertaking in the lease, and in doing the work his men took up a movable floor or platform made and used by the lessees, and stood it on edge. One

of the servants of the lessees assisted in setting it on edge, and, to make it safe, tied it with a rope. The rope got loose, and the platform fell on the plaintiff, a servant of the lessees, and injured him. In an action against both the lessees and the lessor, the jury found negligence against both defendants:—

Held, that the jury were justified in finding that the platform was not safely placed, and the lessees, as the occupiers of the property, the plaintiff being lawfully there, were obliged to have the property in a safe condition.

Held, also, that the lessees could not have any relief against their co-defendant, although claimed in pleading, there being no order for the trial of an issue between the defendants.

Cope v. Crichton (1899), 18 P.R. 462, followed.

Held, that the lessor owed no duty to the plaintiff, and was under no liability to him for non-repair, notwithstanding that he actually came upon the premises and did work; he was not to be considered as in occupation, because the work he was doing was for the benefit of the lessees, who might have waived it and excluded him if they chose; and so, notwithstanding the finding of negligence, the lessor was not liable to the plaintiff.

Malone v. Laskey, [1907] 2 K.B. 141, specially referred to.

Judgment of *MAGEE, J.*, varied. *Gregson v. Henderson Roller Bearing Co.*, 584.

See INNKEEPER — MASTER AND SERVANT, 2—PARTNERSHIP, 2—RAILWAY, 2—STREET RAILWAYS, 2.

NEW TRIAL.

See RAILWAY, 2.

NEW TRUSTEE.

See TRUSTS AND TRUSTEES.

NOTICE.

See RAILWAY, 1.

NOVATION.

See CONTRACT, 5.

ONTARIO RAILWAY AND MUNICIPAL BOARD.

See ASSESSMENT AND TAXES, 1,
4—STREET RAILWAYS, 1.

PARK COMMISSIONERS.

See STREET RAILWAYS, 1.

PARTIES.

Third Party Procedure — Con. Rule 209—Relief over — Tort — Measure of Damages — Remote-ness.—In an action for damages arising from the plaintiff's business as a river ferryman being interfered with by the defendants' logs blocking the river, the defendants claimed relief over against a power company, alleging that at a point below the plaintiff's ferry docks the power company had erected a dam and power plant in such a manner that driving logs down the river was impeded, and that the sluiceway provided by the power company in their dam was inadequate for the purposes intended. The defendants did not claim a right against the third parties by reason of breach of any express or implied contract:—

Held, assuming that the power company were guilty of tort in building their dam and impeding the flow of the waters of the river, that Con. Rule 209 does not apply to such a case, but is confined to cases where the right to relief over

is given by law in consequence of a breach of contract between the third party and the defendant, or is a right given by statute.

But, even if the Rule were applicable to claims arising out of tort, the damages suffered by the plaintiff were not the same that the defendants would recover against the third parties, if entitled to recover anything; and again the Rule did not apply.

Miller v. Sarnia Gas Co. (1900), 2 O.L.R. 546, followed.

Seem, that the damages alleged by the plaintiff were too remote. *Gagne v. Rainy River Lumber Co.*, 433.

See PUBLIC HEALTH ACT.

PARTNERSHIP.

1. *Holding out — Estoppel — Representation of Authority—Publicity.*—A father and son were ostensible partners; the father held out the son as doing insurance business with him as a principal, under the name of M. & Son; the son, by signature and conduct, represented to the plaintiffs that he was authorised to use the father's name, and obtained an agency from the plaintiffs for the issue and sale of money orders in the name of M. & Son, the plaintiffs believing that the father and son were partners. Publicity as to the firm M. & Son was given by advertisement, letter-heads, office sign, etc.:—

Held, that, to fix the father with the consequences of his son's acts in the name of the firm, it was not essential that the father should have himself made any representation to the plaintiffs; it was enough that the father had held out his son as his partner under such circumstances of publicity as to satisfy a jury that the plaintiffs

knew of it and believed the son to be a partner of the father; and upon the evidence the father was liable to the plaintiffs for money orders issued by the son.

Judgment of RIDDELL, J., reversed. *Dominion Express Co. v. Maughan*, 310.

2. *Operation of Thresher — Injury to Property of Partner—Contract — Breach — Damages—Negligence—Right of Partner against Partnership and Co-partners — Judicature Act and Rules — Contribution.*—The plaintiff, a member of a partnership or syndicate owning and operating a thresher, was held entitled to recover from the partnership damages awarded to him by a jury for negligence of the servant of the partnership in the operation of the thresher upon the plaintiff's premises, whereby his property was injured, and the costs of the action—there being a regulation of the partnership that a contract for threshing might be made with a member as with a stranger—with a declaration as against the individual defendants, the other members of the partnership, that, in case the judgment should not be realised out of the assets of the partnership, the deficiency should be borne by them and the plaintiff in proportion to the number of their respective shares in the partnership: Judicature Act, sec. 57; Con. Rules 222, 228, 230.

The damages were to be regarded as for breach of the defendants' contract to take due care, in doing the threshing, not to injure the grain or other property of the plaintiff. *Bigelow v. Powers*, 559.

See CONTRACT, 3, 5—WRIT OF SUMMONS, 1.

PASSENGER FARES.

See STREET RAILWAYS, 1.

PENALTY.

See INNKEEPER — LIQUOR LICENSE ACT.

PERJURY.

See CRIMINAL LAW, 8.

PLAN.

See MINES AND MINERALS.

PLEADING.

See NEGLIGENCE, 3.

PRACTICE.

See APPEAL—COSTS — NEGLIGENCE, 3 — PARTIES — PUBLIC HEALTH ACT—SUCCESSION DUTY —WILL, 3—WRIT OF SUMMONS.

PREFERENTIAL LIEN.

See LANDLORD AND TENANT, 1.

PRESUMPTION OF DEATH.

See QUIETING TITLES ACT.

PRIVY COUNCIL.

See APPEAL, 5.

PROGRESS ESTIMATES.

See MECHANICS' LIENS, 1.

PROHIBITION.

See MUNICIPAL CORPORATIONS, 2.

PROMISSORY NOTE.

See BILLS AND NOTES—CONTRACT, 3, 5—MECHANICS' LIENS, 2.

PROVINCIAL LEGISLATURE.

See CONSTITUTIONAL LAW.

PROVISIONAL DIRECTORS.

See COMPANY, 2.

PUBLIC HEALTH ACT.

Employment of Physician by Local Board of Health to Attend Smallpox Patients—Remuneration—Quantum Meruit—Remedy—Action against Members of Board—Order on Treasurer of Municipality—Secs. 57 and 93 of Act—Condition Precedent—Inability of Patients to Pay—Parties—Municipal Corporation—Motion for Mandamus.]—By a resolution of the Local Board of Health of a township, the plaintiff, a medical practitioner, was in November, 1908, appointed to attend persons suffering from smallpox within the township. The resolution made no reference to the rate of remuneration. The plaintiff was present when the resolution was passed, and, being asked what his charge would be, named \$100 a week, but the Board refused to pay that sum:—

Held, on the evidence, that there was no *consensus* as to the remuneration the plaintiff was to receive; he was entitled (subject to the determination of the question of liability) to be remunerated on a *quantum meruit*; and, having regard to the fact that while attending the smallpox patients he carried on his ordinary practice, payment by the visit was the proper mode of remuneration, and \$25 would be a proper allowance for each visit.

The plaintiff sued the township corporation and the persons who in 1908 constituted the Local Board of Health of the township

for \$2,300 for his services, and asked for a judgment in the nature of a mandamus or injunction requiring the individual defendants to sign, execute, and deliver an order upon the corporation or their treasurer for the amount of the plaintiff's claim:—

Held, that the plaintiff was not entitled to a personal judgment against the individual defendants; and it was to the means of payment provided by sec. 57 of the Public Health Act, R.S.O. 1897, ch. 248, that it must be taken that the contracting parties intended that the plaintiff should look for his remuneration, *i.e.*, an order of the members of the Local Board upon the treasurer of the municipality for payment "for services performed under their direction by virtue of this Act."

The only section of the Act conferring power on a Local Board to employ a physician to attend smallpox patients at the expense of the municipality is sec. 93; and under that section it is a condition precedent to the liability of the municipality that the patients should themselves be unable to pay, of which no proof was given in this case, and so the action failed:

Dictum of BURTON, J.A., in *Township of Logan v. Hurlburt* (1893), 23 A.R. 628, at p. 657, approved.

Bibby v. Davis (1902), 1 O.W.R. 189, distinguished.

Scheme of the Act considered.

In any view of the plaintiff's rights, the township corporation was not a proper party, as it was not in default.

Quare, whether the proper remedy of the plaintiff, if entitled to an order under sec. 57, was not to be obtained by a motion for a prerogative writ of mandamus.

Toronto Public Library Board v. City of Toronto (1900), 19 P.R. 329, referred to. *Ross v. Township of London*, 578.

PUBLISHER.

See CONTRACT, 1.

QUANTUM MERUIT.

See COMPANY, 1 — PUBLIC HEALTH ACT.

QUIETING TITLES ACT.

Certificate of Title Free from Mortgage—Mortgagee not Heard of for Long Period—Presumption of Death—Claim not Made by Mortgagee or Heirs—Suggestion of Claim of Crown by Escheat—Statute of Limitations—Crown Grant after Mortgage and Presumption of Death—Absence of Reservation—Estoppel.—Upon the investigation of the petitioner's title to land pursuant to a petition under the Quieting Titles Act, it appeared that the petitioner's grantor, on the 2nd February, 1877, mortgaged the land for \$900 to J.I., who had not been heard from, or heard of as being alive, since a date prior to the 2nd February, 1878, and nothing had been paid on the mortgage since that date. In the proceedings under the Act no claim was made on behalf of J.I. or by any one under the mortgage. The Crown, alleging that J.I. died intestate and without heirs, and suggesting a possibility of asserting a right within sixty years from the time the cause of action arose, but not proving or attempting to prove any claim, asked that the petitioner's certificate of title should be expressly made subject to the right of the Crown to the mortgage moneys:—

Held, that under the Act the Crown was to be treated as an individual, and the rights of the Crown as the rights of an individual; the alleged possible right of the Crown was that J.I. may have died intestate and without heirs; that right, if it existed, could as well be established now as later, because, to establish it, J.I. must have died before the 2nd February, 1896. The Crown, in asserting a claim by escheat, could not rely solely on the presumption of J.I.'s death; intestacy and death without leaving heirs would require to be proved.

Held, also, that, the Crown having granted the land to the petitioner's grantor in 1890, without any reservation of its right to the mortgage moneys or to the land, the mortgage, as between the Crown and its grantee, was cut out by the grant; and the petitioner, being a purchaser for value, took free from the mortgage.

The petitioner was therefore entitled to a certificate free from the suggested claim of the Crown. *Re Raycraft*, 437.

RAILWAY.

1. *Carriage of Goods—Claim for Detention—Failure to Give Notice as Required by Condition of Contract—Construction—Misprint—"Or"—"Are."*—Although the defendants were found guilty of negligence in unreasonably detaining and failing within a reasonable time to deliver a car-load of beans shipped by the plaintiff, an action to recover damages for that negligence was dismissed because the plaintiff had failed to give notice in writing and particulars of his claim for detention, to the station freight agent at or

nearest to the place of delivery, within thirty-six hours after the goods were delivered.

The condition printed on the back of the shipping bill requiring such notice was one approved by the Board of Railway Commissioners, and read: "There shall be no claim for . . . detention of any goods . . . unless notice in writing and the particulars of the claim . . . are given . . . within thirty-six hours after the goods . . . or such portions of them as are not lost or delivered:"—

Held, that "or" should be read "are," for which it was obviously a misprint, and the condition so made effective. *Newman v. Grand Trunk R.W. Co.*, 285.

2. *Collision—Injury to Person on Train—Licensee or Trespasser—Negligence—Findings of Jury—Evidence—Question not Left to Jury—Determination by Court—Consent—Judgment—New Trial.*—In a collision between a van or car of the defendants and a backing train of the Pere Marquette Railway Company, the plaintiff, who was standing on the platform of one of the Pere Marquette coaches, the foremost one in the train as it moved reversely, and who was on the coach not as a paying passenger, but getting a gratuitous "lift" for a short distance, was injured. The collision was caused by the negligence of the defendants:—

Held, that the plaintiff was a licensee, and, not being wrongfully where he was, was entitled to recover damages against the defendants.

Harris v. Perry & Co., [1903] 2 K.B. 219, and *Sievert v. Brookfield* (1905), 35 S.C.R. 494, followed.

And *semble*, per BOYD, C., that,

in the circumstances, the defendants would not be exempt from liability, though the plaintiff was nothing else than a mere trespasser.

At the trial the jury found, in answer to questions, that the plaintiff was not upon the train or platform by permission of the Pere Marquette Railway Company. The jury were not asked to find whether he was there with the permission of the trainmen in charge of the train:—

Held, that it was open to the jury to find, and they should have found, upon the direct evidence as to that occasion, that the plaintiff was there with the knowledge and consent of the man conducting the backing operations, and also, on the uncontradicted evidence, that he and others had been there on many other occasions; and this was sufficient to justify a verdict for the plaintiff.

At the trial, the parties consented to the Court determining any point necessary for the determination of the rights of the parties not covered by the questions submitted:—

Held, that the judgment for the defendants entered upon the findings of the jury should be set aside, and judgment entered for the plaintiff for the damages assessed by the jury; the necessity for a new trial being obviated by the consent.

Judgment of MEREDITH, C.J.C. P., reversed. *Barnett v. Grand Trunk R.W. Co.*, 390.

3. *Expropriation of Land—Dominion Railway Act—Compensation—Arbitration and Award—Value of Land Taken—Damage to Residue of Claimant's Land—Amounts not Separated in Award—Statement of Dissenting Arbitrator*

—Procedure on Appeal—Reduction of Amount Awarded—Interference with Working of Farm—Expense of Constructing New Road—Interest—Date of Taking Possession—Jurisdiction of Arbitrators.]—Arbitrators having awarded to the claimant \$30,607 as compensation for about 4½ acres of his stock and dairy farm of 465 acres, expropriated by the contestants for their right of way, under the Dominion Railway Act, and for damage to the residue of his land, the amount awarded was reduced on appeal to \$20,000.

The arbitrators not having stated the principles by which they were guided in coming to their conclusions, and not having separated the amount allowed for the land actually taken and the amount awarded as damages for lands injuriously affected, the course taken by the Court on the appeal was that commended by the Judicial Committee in *James Bay R.W. Co. v. Armstrong*, [1909] A.C. 624, viz., to go through all the evidence, and, having due regard to the findings of the arbitrators, so far as they could be ascertained, to examine into the justice of the award.

The award was that of two of the three arbitrators; the non-assenting arbitrator stated his views and also his understanding of the grounds on which his colleagues based their award:—

Held, that the Court could not pay regard to this statement as setting forth the grounds upon which the award was based.

The part of the farm taken for the railway was in the valley of the Don river, which traversed a part of the farm. The farm buildings were for the most part in the valley, but the arable part of the farm was largely in the uplands,

and access from the buildings to the uplands was gained by means of a loop-shaped roadway, commencing at a gate entrance to the farmyard on the east side of the west or north branch of the Don, and going in a southerly direction towards the Don Mills road, there turning westerly and crossing the stream by means of a bridge, and then proceeding in a north-westerly direction to a gate at the foot of the roadway leading up a very steep hill and ascending by means of it to the uplands. The gates were kept closed or open as occasion needed for the purpose of controlling the wandering of the stock, and regulating the hauling of loads to and from the uplands. The road-bed embankment of the railway intersected both of the roadways at a height of 6 or 7 feet above their grade. The main complaint of the claimant was, that passing to and fro between the buildings and the uplands with horses, cattle, vehicles, and farm implements, involved crossing the railway twice, and opening and closing four gates, together with the delay and risk attendant thereon:—

Held, upon the evidence, that the difficulty could be overcome by the construction of a new roadway with a bridge, at an expense of \$3,000, which was an ample allowance in respect of this cause of complaint; and, while it might be true, as stated by the arbitrators, that it was not within their power to compel either the claimant or the contestants to construct the roadway and bridge, yet they were not justified in making an allowance for that particular damage greater than a sum sufficient to enable it to be obviated for all time.

The measure of the damage to which the claimant was entitled was the value of the land taken and the depreciation occasioned to the remainder by the construction and user of the railway upon the part taken; and justice to the contestants required that the award should shew on its face what amount was allowed in respect of each of these items.

The principle on which the inquiry as to the compensation when some land is taken and some injuriously affected should be proceeded with is to ascertain the value to the claimant of his property before the taking, and its value after the part has been taken, having regard to all the directions of sec. 198 of the Railway Act, and deduct the one sum from the other.

James v. Ontario and Quebec R.W. Co. (1886-8), 12 O.R. 624, 15 A.R. 1, followed.

The contestants took possession of the land on the 13th October, 1905, and the arbitrators awarded interest from that day:—

Held, that sec. 153 (2) of the Act 3 Edw. VII. ch. 58, now sec. 192 (2) of the Railway Act, was enacted for the purpose of fixing the time as of which the value and damage are to be ascertained; the question of interest is not dealt with in terms, and there is nothing in the words to interfere with the operation of the general law, which, as between vendor and purchaser, fixes the time at which interest commences as that at which the purchaser takes or may safely take possession.

When some land is taken, and other land is injuriously affected, the amounts awarded in respect of both are to be treated as purchase money.

Re Macpherson and City of Toronto (1895), 26 O.R. 558, approved.

Whether or not it was correct for the arbitrators to award the interest was not material; no substantial wrong had been done by stating it in the award. *Re Davies and James Bay R.W. Co.*, 534.

REBATE.

See LANDLORD AND TENANT, 3.

RECOGNIZANCE.

See CRIMINAL LAW, 3.

REFERENCE.

See APPEAL, 5—LANDLORD AND TENANT, 3.

REMAINDERMEN.

See WILL, 1, 4.

REPLEVIN.

See LANDLORD AND TENANT, 3.

RESOLUTION.

See COMPANY, 3.

RESTRAINT OF TRADE.

See CRIMINAL LAW, 4.

REVENUE.

See SUCCESSION DUTY.

RULES.

Con. Rule 42.]—*See* COSTS.
Con. Rule 162.]—*See* WRIT OF SUMMONS, 2, 3.

Con. Rule 173.]—*See* WRIT OF SUMMONS, 2.

Con. Rule 209.]—*See* PARTIES.

Con. Rules 222, 228, 230.]—*See* PARTNERSHIP, 2.

Con. Rule 223.]—*See* WRIT OF SUMMONS, 1.

Con. Rule 498.]—*See* EVIDENCE.

Con. Rule 777.]—*See* WRIT OF SUMMONS, 1.

Con. Rule 825.]—*See* COSTS.

Con. Rules 826-835.]—*See* APPEAL, 5.

Con. Rules 1069, 1072.]—*See* LANDLORD AND TENANT, 3.

Con. Rules 1204, 1208.]—*See* COSTS.

Con. Rules 1279 *et seq.*]—*See* CRIMINAL LAW, 3.

SALARY.

See COMPANY, 3.

SALE OF GOODS.

Perishable Articles—Destruction in Transit—Incidence of Loss—Contract—Shipment "f.o.b."—Bill of Lading—Property not Passing until Payment of Draft.]—A quantity of apples ordered by the defendants, from Regina, Saskatchewan, were placed on cars at Belleville, Ontario, by the plaintiff, the seller, in pursuance of one term of the contract, "f.o.b. Ontario." They were to be carried to Regina, and to be paid for "cash on delivery at Regina." They were sent with contemporaneous bills of lading made out to the seller, or his agents, a bank, to be held against the arrival of the goods. Bills of exchange at sight were also forwarded with the bills of lading, to be accepted and paid by the purchasers, and upon payment the bills of lading were to be handed over to the defendants. The invoice did not say that the goods were shipped on account of or at the risk of the buyers, whereas the bills of lading shewed that the goods were shipped as the property of the seller or his agents. The apples were frozen in transit, and the defendants refused to accept or pay for them:—

Held, upon consideration of the contract and the dealings of the parties, that the shipment f.o.b. at Belleville was not a constructive delivery to the carrier for the purchasers; it was a delivery of possession to the carrier pursuant to the bill of lading and for the seller or his agents at Regina; and no delivery of possession to the purchasers was contemplated till they accepted and paid for the apples at Regina. Till then possession and property were alike withheld by the seller, and the property was to be divested from him and lodged in the purchasers first and only when payment was made; the property was still the seller's during the transit, and on him the loss fell.

Mirabita v. Imperial Ottoman Bank (1878), 3 Ex. D. 164, followed.

Browne v. Hare (1858-9), 3 H. & N. 484, 4 H. & N. 822, distinguished.

Judgment of BRITTON, J., reversed. *Graham v. Laird Co.*, 11.

SALE OF LAND.

See VENDOR AND PURCHASER.

SCRUTINY.

See MUNICIPAL CORPORATIONS, 2.

SEAL.

See COMPANY, 1—MUNICIPAL CORPORATIONS, 1.

SECURITY FOR COSTS.

See COSTS.

SERVICE OUT OF THE JURISDICTION.

See WRIT OF SUMMONS.

SETTLED ESTATE.

See TRUSTS AND TRUSTEES.

SHARES.

See BROKER—COMPANY, 5, 6, 7.

STATED CASE.

See APPEAL, 2.

STATUTE OF FRAUDS.

See CONTRACT, 4.

STATUTE OF LIMITATIONS.

See CHARGE ON LAND—QUIETING TITLES ACT—VENDOR AND PURCHASER—WILL, 1.

STATUTES.

2 W. & M., sess. 1, ch. 5, sec. 4 (Distress).....

See APPEAL, 1.

12 Vict. ch. 108 (C.) (Incorporating Ottawa Sisters of Charity).....

See COMPANY, 1.

30 & 31 Vict. ch. 3, secs. 91 (2), 92 (8), (10) (Imp.) (British North America Act).....

See CONSTITUTIONAL LAW, 1, 2.

R.S.O. 1877, ch. 38, sec. 37 (Appeals to Court of Appeal).....

See APPEAL, 5.

49 Vict. ch. 28 (O.) (Workmen's Compensation for Injuries Act).....

See MASTER AND SERVANT, 2.

R.S.O. 1887, ch. 136, sec. 11 (Insurance Act).....

See INSURANCE, 2.

R.S.O. 1887, ch. 170, sec. 31 (Railway Act).....

See STREET RAILWAYS, 1.

55 Vict. ch. 96 (O.) (Incorporating International Railway Company).

See STREET RAILWAYS, 1.

R.S.O. 1897, ch. 36, sec. 42 (Mines Act)

See MINES AND MINERALS.

R.S.O. 1897, ch. 51, secs. 50, 74, 75, 76, 77 (Judicature Act).....

See APPEAL, 3.

R.S.O. 1897, ch. 51, sec. 57.....

See PARTNERSHIP, 2.

R.S.O. 1897, ch. 51, sec. 74.....

See TRUSTS AND TRUSTEES.

R.S.O. 1897, ch. 60, sec. 79 (Division Courts Act).....

See DIVISION COURTS.

- R.S.O. 1897, ch. 83, secs. 1, 6 (Habeas Corpus Act)
See LIQUOR LICENSE ACT.
- R.S.O. 1897, ch. 90, secs. 2, 8 (Summary Convictions Act).....
See APPEAL, 2.
- R.S.O. 1897, ch. 109, secs. 9, 10 (Unorganized Territory Act).....
See APPEAL, 3.
- R.S.O. 1897, ch. 135 (Quieting Titles Act).....
See QUIETING TITLES ACT.
- R.S.O. 1897, ch. 153, secs. 4, 9 (Mechanics' and Wage-Earners' Lien Act).....
See MECHANICS' LIENS, 1.
- R.S.O. 1897, ch. 153, secs. 4, 22 (2), 28
See MECHANICS' LIENS, 2.
- R.S.O. 1897, ch. 160, sec. 3 (5) (Workmen's Compensation for Injuries Act).....
See MASTER AND SERVANT, 2.
- R.S.O. 1897, ch. 170, sec. 34 (1) (Landlord and Tenant's Act).....
See LANDLORD AND TENANT, 1.
- R.S.O. 1897, ch. 191 (Companies Act)
See COMPANY, 7.
- R.S.O. 1897, ch. 209, sec. 44 (Electric Railway Act).....
See COMPANY, 2.
- R.S.O. 1897, ch. 223, sec. 411 (Municipal Act).....
See ASSESSMENT AND TAXES, 3.
- R.S.O. 1897, ch. 224, sec. 22 (Assessment Act).....
See ASSESSMENT AND TAXES, 5.
- R.S.O. 1897, ch. 226 (Municipal Drainage Act).....
See APPEAL, 4.
- R.S.O. 1897, ch. 245, secs. 72, 101, 121 (Liquor License Act).....
See LIQUOR LICENSE ACT.
- R.S.O. 1897, ch. 248, secs. 57, 93 (Public Health Act).....
See PUBLIC HEALTH ACT.
- R.S.O. 1897, ch. 264, secs. 3, 6 (Accidents by Fire in Hotels).....
See INNKEEPER.
- R.S.O. 1897, ch. 292, sec. 73 (Public Schools Act).....
See ASSESSMENT AND TAXES, 3.
- R.S.O. 1897, ch. 342, sec. 18, sub-sect. 2 (Distress).....
See APPEAL, 1.
- 62 Vict. ch. 82 (O.) (City of Stratford)
See ASSESSMENT AND TAXES, 3.
- 63 Vict. ch. 98 (O.) (City of Stratford)
See ASSESSMENT AND TAXES, 3.
- 63 Vict. ch. 140, sec. 3, 11 (O.) (incorporating Ottawa Y.M.C.A.).....
See ASSESSMENT AND TAXES, 2.
- 1 Edw. VII. ch. 13, sec. 2 (O.) (amending Summary Convictions Act)....
See APPEAL, 2.
- 1 Edw. VII. ch. 92, sec. 12 (O.) (incorporating Windsor Essex and Lake Shore Rapid Railway Company)..
See COMPANY, 2.
- 3 Edw. VII. ch. 19, secs. 369, 371 (O.) (Municipal Act).....
See MUNICIPAL CORPORATIONS, 2.
- 3 Edw. VII. ch. 19, sec. 583 (34) (O.)..
See MUNICIPAL CORPORATIONS, 3.
- 3 Edw. VII. ch. 22, sec. 4 (amending Municipal Drainage Act).....
See APPEAL, 4.
- 3 Edw. VII. ch. 58, sec. 153 (2) (D.) (Railway Act).....
See RAILWAY, 3.
- 4 Edw. VII. ch. 23, sec. 172 (O.) (Assessment Act).....
See ASSESSMENT AND TAXES, 5.
- 4 Edw. VII. ch. 23, sec. 36 (3) (O.)....
See ASSESSMENT AND TAXES, 1.
- 4 Edw. VII. ch. 23, sec. 76 (O.).....
See ASSESSMENT AND TAXES, 4.
- 6 Edw. VII. ch. 15 (O.) (Electrical Power).....
See CONSTITUTIONAL LAW, 1.
- 6 Edw. VII. ch. 30, sec. 171 (O.) (Railway Act).....
See STREET RAILWAYS, 1.
- 6 Edw. VII. ch. 31, sec. 51 (O.) (Railway and Municipal Board Act)
See ASSESSMENT AND TAXES, 4.
- R.S.C. 1906, ch. 37, secs. 192 (2), 198 (Railway Act).....
See RAILWAY, 3.
- R.S.C. 1906, ch. 37, sec. 415.....
See CRIMINAL LAW, 6.
- R.S.C. 1906, ch. 119, secs. 31, 32 (Bills of Exchange Act).....
See BILLS AND NOTES.
- R.S.C. 1906, ch. 145, sec. 16 (Evidence Act).....
See CRIMINAL LAW, 1.
- R.S.C. 1906, ch. 146, secs. 2 (35) (a), 705 (b) (Criminal Code).....
See APPEAL, 2.
- R.S.C. 1906, ch. 146, sec. 119.....
See NEGLIGENCE, 2.
- R.S.C. 1906, ch. 146, secs. 204, 570....
See CRIMINAL LAW, 1.
- R.S.C. 1906, ch. 146, sec. 217.....
See CRIMINAL LAW, 7.
- R.S.C. 1906, ch. 146, sec. 238 (l).....
See CRIMINAL LAW, 9.
- R.S.C. 1906, ch. 146, secs. 253, 1014
See CRIMINAL LAW, 6.
- R.S.C. 1906, ch. 146, secs. 302, 1003..
See CRIMINAL LAW, 2.
- R.S.C. 1906, ch. 146, sec. 498.....
See CRIMINAL LAW, 4.
- R.S.C. 1906, ch. 146, secs. 576, 1126..
See CRIMINAL LAW, 3.
- R.S.C. 1906, ch. 146, sec. 684 (2).....
See CRIMINAL LAW, 5.

- 7 Edw. VII. ch. 2, sec. 7, clause 46 (*d*) (O.) (Interpretation Act).....
See LIQUOR LICENSE ACT.
- 7 Edw. VII. ch. 4, sec. 24 (O.) (Voters' Lists Act).....
See MUNICIPAL CORPORATIONS, 2
- 7 Edw. VII. ch. 10, secs. 8, 10 (2) (O.) (Succession Duty Act).....
See SUCCESSION DUTY.
- 7 Edw. VII. ch. 18, secs. 23, 24 (O.) (Mines Act).....
See MINES AND MINERALS.
- 7 Edw. VII. ch. 19 (O.) (Electrical Power).....
See CONSTITUTIONAL LAW, 1.
- 7 Edw. VII. ch. 34, sec. 88 (O.) (Companies Act).....
See COMPANY, 3.
- 7 Edw. VII. ch. 34, sec. 94 (O.).....
See COMPANY, 4.
- 8 Edw. VII. ch. 22 (O.) (Electrical Power).....
See CONSTITUTIONAL LAW, 1.
- 8 & 9 Edw. VII. ch. 9, sec. 2 (schedule) (D.) (amending Criminal Code)....
See CRIMINAL LAW, 6.
- 9 Edw. VII. ch. 19, sec. 9 (O.) (Electrical Power).....
See CONSTITUTIONAL LAW, 1.
- 9 Edw. VII. ch. 46, (O.) (Judges' Orders Enforcement Act).....
See APPEAL, 4.
- 9 Edw. VII. ch. 82, sec. 12 (O.) (amending Liquor License Act).....
See LIQUOR LICENSE ACT.

STATUTES, INTERPRETATION OF.

- See ASSESSMENT AND TAXES, 2,*
 3—CONSTITUTIONAL LAW—CRIMINAL LAW, 6.

STAY OF PROCEEDINGS.

- See APPEAL, 5*—CONSTITUTIONAL LAW—COSTS.

STREET RAILWAYS.

1. *Electric Railway—Passenger Fares—Approval of Tariff by Park Commissioners—Ontario Railway Act, 1906, sec. 171 (5)—Ontario Railway and Municipal Board—55 Vict. ch. 96 (O.).*—The Ontario Railway and Municipal Board, upon an application by the Nia-

gara Falls Board of Trade, made an order compelling the International Railway Company, owning and operating an electric railway along the bank of the Niagara river from Queenston to Chippawa, and incorporated by 55 Vict. ch. 96 (O.), to comply with sec. 171 of the Ontario Railway Act, 1906, by accepting a five cent cash fare for conveying passengers for any distance not exceeding three miles, etc.:—

Held, reversing the order of the Board, that the company came within sub-sec. 5 of sec. 171, providing that "this section shall not apply to a company whose tariff for passenger fares is subject to the approval of any commissioners in whom are vested any park or lands owned by the Crown for the use of the public of the Province of Ontario;" and, sec. 171 being thus excluded, that the Board had no power, on an application such as was made in this case, to direct what fares the company should charge.

The effect of the incorporation into the company's Act of sec. 31 of the Railway Act of Ontario, R.S.O. 1887, ch. 170, was not to abrogate clause 32 of the agreement with the Commissioners for the Queen Victoria Niagara Fall Park, set out as schedule B to the company's Act. They should be read together in such a way as to give effect to both; and reading them as subjecting the company's tariff to the approval of both the commissioners and the Lieutenant-Governor in council (or the Board substituted therefor) was not inconsistent with the intention of the parties. *Re Niagara Falls Board of Trade and International R.W. Co.*, 197.

2. *Injury to Person Crossing*

Track — Negligence — Excessive Speed—Failure to Give Warning—Neglect of Motorman—Failure of Person Injured to Look for Approaching Car—Evidence for Jury.]

—The plaintiff, who was somewhat hard of hearing, attempted to cross from the east to the west side of a highway on which the defendants' single track was laid. Before he began to cross he observed a car of the defendants standing upon a siding about 550 feet north of him, and, from his knowledge of the practice of the defendants, inferred that it was waiting there for a car from the south to pass it. He, therefore, just before crossing the track, looked south for a car, but did not look north, and had almost passed over the track when he was struck by a car coming from the north, and injured. There was evidence that the gong was not sounded nor the whistle blown nor the speed of the car slackened as he approached the track. He could have seen the car approaching had he turned and looked, and the motorman must have seen him approaching the track. Had the brakes been applied and the car delayed for a second or two, he would have escaped. There was evidence that it was going at from 16 to 18 miles an hour:—

Held, that there was some evidence of negligence on the part of the motorman which should have been submitted to the jury; and a nonsuit was set aside.

Per MULLOCK, C.J.Ex.D., that the plaintiff was not to assume that the motorman would start his car from a point enabling him to see the plaintiff walking in a direction that would soon bring him upon the track, and, nevertheless, that the car would be driven at such a speed as to overtake him,

and that without giving any warning of its approach.

Per CLUTE, J., that there was evidence to submit to the jury of negligence on the part of the motorman in not sounding the gong, in not exercising more care in keeping a look-out, and in not applying the brakes before the car struck the plaintiff. He could not but see that the plaintiff was approaching the track, and it was to be inferred from the evidence that he ought to have known that the plaintiff was oblivious of the approaching car.

Brill v. Toronto R.W. Co. (1909), 13 O.W.R. 114, distinguished.

Judgment of MACMAHON, J., reversed. *Jones v. Toronto and York Radial R.W. Co.*, 71.

See COMPANY, 2.

SUCCESSION DUTY.

7. *Edw. VII. ch. 10, sec. 8 (O.)—Valuation of Property by Executor—Inquiry by Surrogate Court Judge at Instance of Provincial Treasurer—"Fair Market Value"—Power of Judge to Reduce Valuation—Costs—Counsel.Fee—Quantum.]*—By sec. 8 of the Ontario Succession Duty Act, 7 *Edw. VII. ch. 10*, in force when the proceedings in this case took place, if the Treasurer of the Province is not satisfied with the value of any property forming part of the estate of a deceased person, as sworn to by the executor applying for probate, the Surrogate Court Judge shall, at the instance of the Treasurer, inquire as to the value so sworn to, and shall value all property at the fair market value; and sec. 4 enacts that in determining "dutable value" the value shall be taken as at the date of the death of the deceased:—

Held, that the "fair market value" of any property must be determined by evidence of what could have been procured for it at the date of the death of the deceased, had it been then offered for sale.

And where the executor valued a farm, which was of uncertain value on account of its oil-producing capabilities, not fully developed at the date of the death, at \$20,000, and the Surrogate Court Judge, upon an inquiry at the instance of the Treasurer, reduced the valuation to less than \$12,000, the Court of Appeal, upon an appeal by the Treasurer, under sec. 10, restored the valuation of the executor.

Per OSLER, J.A., that the proceeding before the Surrogate Court Judge is not an appeal from the executor's valuation; it is rather a general inquiry into the dutiable value of the estate; and it is open, on the one hand to the Treasurer, and on the other to the executor, to prove what was the fair market value, with an appeal to either party from the decision of the Surrogate Court Judge.

Per GARROW, J.A., that the power of the Surrogate Court Judge was limited to increasing the valuation if, in his opinion, the evidence warranted an increase; he could not reduce the valuation below that of the executor.

Held, also, *per curiam*, having regard to sec. 10, sub-sec. 2, of the Act, and to item 153 of the County Court tariff, that the Surrogate Court Judge had no jurisdiction to direct payment of a higher counsel fee than \$25.

Judgment of the Judge of the Surrogate Court of Kent reversed. *Re Marshall*, 116.

SUMMARY CONVICTIONS ACT.

See APPEAL, 2.

SUNDAY.

See MUNICIPAL CORPORATIONS, 3.

SURROGATE COURT JUDGE.

See SUCCESSION DUTY.

SYNDICATE.

See PARTNERSHIP, 2.

TAX SALE.

See ASSESSMENT AND TAXES, 5.

TAXES.

See ASSESSMENT AND TAXES.

TENANT FOR LIFE.

See CHARGE ON LAND—WILL, 1, 4.

TENANTS IN COMMON.

See WILL, 1.

THIRD PARTY PROCEDURE.

See PARTIES.

THREATS.

See CRIMINAL LAW, 5.

TIME.

See CONTRACT, 2 — CRIMINAL LAW, 3—MECHANICS' LIENS, 2.

TITLE TO LAND.

See VENDOR AND PURCHASER.

TORT.

See PARTIES.

TRADE COMBINATION.

See CRIMINAL LAW, 4.

TRESPASS.

See RAILWAY, 2.

TRIAL.

See NEGLIGENCE, 3.

TRUSTS AND TRUSTEES.

Settled Estate—Appointment of New Trustee—Order of Judge—Discretion—Review—Appeal to Divisional Court—Jurisdiction—Judicature Act, sec. 74—Opposition by Settlor to Person Appointed—Residence out of Ontario—Special Circumstances—Appointment of same Person by Foreign Court.]—Under sec. 74 of the Judicature Act, an appeal lies to a Divisional Court from the order of a Judge appointing a new trustee.

An order of a Judge of the High Court appointing a new trustee to act with other trustees under a settlement was set aside, where it appeared that the person so appointed was resident out of Ontario, in which Province certain property subject to the settlement was situated; that the settlor was opposed to his appointment; and that there was reason to believe, from the circumstances and associations of the person so appointed, that he would not be able to hold an even hand between the persons interested under the trust; although it also appeared that he had been appointed a trustee by a Nova Scotia Court to act under the same settlement in respect of property in that Province. The discretion exercised in making such an appointment should be guided by general rules and principles; and there were in this case no such special circumstances as should induce the Court to depart therefrom.

In re Tempest (1866), L.R. 1 Ch. 485, followed.

Order of FALCONBRIDGE, C.J.K. B., reversed. *Re Jones Trusts*, 457.

See INSURANCE, 2 — VENDOR AND PURCHASER—WILL, 4.

UNSAFE PREMISES.

See NEGLIGENCE, 3.

VAGRANCY.

See CRIMINAL LAW, 9.

VALUATION.

See SUCCESSION DUTY.

VENDOR AND PURCHASER.

Title of Devisee under Will—Legacies Charged on Land—Executors — Trustees — Statute of Limitations—Application of Purchase Money—Requisitions as to Title—Waiver by Taking Possession.]—The testatrix, dying on the 2nd May, 1894, by her will devised land to M., but charged thereon certain legacies and the payment of her debts and funeral and testamentary expenses, and exempted all the rest of her estate from liability therefor, and gave her executors (M. being one) power to mortgage or sell the land devised for the purpose of paying the sums charged thereon. The will was not proved. The executors on the 24th May, 1899, conveyed the land to M., and he was in possession until the 24th May, 1909, when a person to whom he had contracted to sell the land took possession. There was no assent to any legacy and no setting apart of any sum:—

Held, upon a petition under the Vendors and Purchasers Act, that neither the executors as such nor M. were trustees, and the legacies were barred by the Statute of Lim-

itations; but, if not, that M. had the right to sell, and the purchaser was not bound to see to the application of the purchase money.

In re Henson, Chester v. Henson (1908), 77 L.J.N.S. Ch. 598, followed.

Held, also, that the purchaser, having taken possession without any consent, and without any agreement, express or implied, and made alterations in the property, was not entitled to insist upon requisitions as to title being satisfied. *Re Mulholland and Morris*, 27.

VICTUALLING HOUSES.

See MUNICIPAL CORPORATIONS, 3.

VOTERS' LISTS ACT.

See MUNICIPAL CORPORATIONS, 2.

VOTING.

See MUNICIPAL CORPORATIONS, 2.

WAGES.

See COMPANY, 4.

WAIVER.

See VENDOR AND PURCHASER.

WASTE.

See CHARGE ON LAND.

WAY.

See MINES AND MINERALS—MUNICIPAL CORPORATIONS, 1—NEGLIGENCE, 1.

WILL.

1. *Construction*—*Devise*—*Estates for Life and in Remainder*—

"Family"—*Tenants in Common*—*Joint Tenants*—*Statute of Limitations*—*Legacies*.]—A testator, dying in 1855, by his will gave to his wife the sole use of his farm "to use as she may think proper until my son (J.) has arrived to the full age of twenty-one years. He is then to get the east of the farm and half of all the property on the farm at that time. They may then work the farm together or if my wife is tired of working the place J. is to have the management of the whole farm and is to support his mother during her widowhood and his four sisters until they are of age or married, at which time to each of the four girls are to get from the proceeds of my estate the sum of," etc. "The real estate to belong to the family as long as any of them are alive and to remain the property of my son's heirs." After J. became of age, in 1865, he undertook the management of the farm and supported his mother and sisters, who assisted in the work. Three of the four sisters married and left the farm. J. remained on the farm working it, and his unmarried sister also remained assisting in the work, until their mother's death in 1907:—

Held, that the word "family" in the last clause of the will meant "children," and the five children of the testator took under the will a life estate as tenants in common, with a vested remainder to J. in fee under the rule in *Shelley's* case.

Held, also, that what was done by J. was consistent with the terms of the will; he was in possession as a tenant for life, under the will, and none the less so because he was permitted by his mother to act as manager during her lifetime; and the Statute of Limitations did not run in his

favour as against any of his sisters while they remained in possession.

Hartley v. Maycock (1897), 28 O.R. 508, distinguished.

Held, also, that the proceeds of the farm, after providing for the support of the mother, belonged to the five tenants in common. But the possession of one tenant in common does not enure to the benefit of those who are out of possession; and the three married sisters, having remained out of possession for the statutory period, were barred by the Statute of Limitations.

The result was, that J. and his unmarried sister were entitled to a two-fifths interest in the whole farm as tenants in common, and were joint tenants of a three fifths interest—the interest of the married sisters—with remainder to J. in fee.

Held, also, that the claims of the sisters to the legacies under the will were barred by the Statute of Limitations.

Judgment of FALCONBRIDGE, C.J.K.B., varied. *McKinnon v. Spence*, 57.

2. *Construction — Devise to Widow during Widowhood with Devise over in Event of Remarriage—Death without Remarriage—Vested Remainder Taking Effect in Possession on Death—Remainderman Dying Intestate—Distribution of Estate — Half-brother.*] — The testator devised land to his wife, to have and to hold for her personal benefit, so long as she “shall remain my widow,” and, in the event of her marrying, to his two daughters; and directed that the daughters should receive their support from the wife out of the property willed to her. Five years after the death of the testator the

widow died without having married again:—

Held, that the devise over was not dependent on the contingency of the widow's marrying again, but took effect upon her death.

The devise to the widow, though not in terms for life if she should so long continue a widow, was in effect the same.

Underhill v. Roden (1876), 2 Ch.D. 494, and other cases to the same effect, followed.

Pile v. Salter (1832), 5 Sim. 411, not followed.

The two daughters took under the will a vested remainder in the land, to take effect in possession upon the marriage or death of the wife.

One of the daughters having died intestate and without issue, her half-brother was *held* entitled as one of her next of kin to an equal share with her sister in her estate, under the Devolution of Estates Act. *Re Branton*, 642.

3. *Construction—Residuary Estate—Distribution, after Death of Widow, among Children and Issue of Deceased Children—Period of Vesting—Advancement to Child—Grandchild Taking Subject to—Infant's Moneys — Retention in Court.*]—The testator by his will provided for payment of specified legacies to his children, and that the residue of his estate should be turned into money, invested by the executors, the income paid to the widow, and on her death “that all the residue of my estate is to be equally divided among all my children living at that time (the death of the widow) and the lawful issue of such as may be dead, *per stirpes*.” There was also a provision that the shares to go to three of the children (one being H.) were to be dealt with accord-

ing to the discretion of the executors.

The son H. was advanced to the extent of \$4,000 in his and his father's lifetime, and it was agreed between them that these advances were to be deducted from H.'s share of the father's estate. The other children also received advances on the same terms.

The will was dated in 1887; the testator died in April, 1897; H. died in August, 1898, leaving one child, born in November, 1897; and the widow of the testator died in 1908:—

Held, that there was no vesting of the residue or any share of it till the death of the widow; but that H.'s child took the share intended for his father as that father's representative (as indicated by the use of the words *per stirpes*), and, standing in his father's shoes, took it subject to deduction in respect of the advancement to his father.

Rose v. Rogers (1870), 39 L.J. Ch. 792, not followed.

In re Scott, [1903] 1 Ch. 1, followed.

Held, also, that the payment out of Court of the infant's share \$30,000, to his mother and Surrogate guardian, though she was of ample means, should not be sanctioned. *Re Carter*, 127.

4. *Construction — Trust — Investment in Land — Sale at Profit — Accretion to Capital — Tenant for Life — Remaindermen.*—The rule that profits arising from the realisation of an investment in shares or bonds or in land are accretions to the capital of the trust fund and do not belong to the tenant for life, deduced from cases decided in New York and other States, adopted.

The testator gave the principal part of his property to his son T., charged with, among other sums, \$35,000 to be paid by T. to trustees to be held by them for the purposes of the E. trust. T. was to pay this sum to the trustees by instalments, and to pay interest on the portions from time to time remaining unpaid. The trustees were to keep the \$35,000 invested, and to pay the interest received from T. and from the investments, to E. during his life, and after his decease to divide the capital amongst his children. There was a proviso that if E. should die leaving his son H. his only child surviving him, only \$15,000 of the E. trust fund should be paid to H., and the remaining \$20,000 should be applied to another trust. The trustees were authorised to invest in the purchase of real estate in Ontario yielding a rental of at least six per cent. per annum, with power from time to time to alter and vary the "securities" into others of a like nature. The trustees made a profit on the sale of land purchased by them for the E. trust:—

Held, that E. was not entitled to the profit. *Re Watkins*, 262.

See CHARGE ON LAND—INSURANCE, 2 — VENDOR AND PURCHASER.

WINDING-UP.

See COMPANY, 5, 6, 7.

WORDS.

"Are."—See RAILWAY, 1.

"Exemption from Taxation."—See ASSESSMENT AND TAXES, 3.

"FAIR MARKET VALUE."—See SUCCESSION DUTY.

"Family."—See WILL, 1.

"*High Court.*"]—See WRIT OF SUMMONS, 1.

"*Located.*"]—See MINES AND MINERALS.

"*Object.*"]—See ASSESSMENT AND TAXES, 2.

"*Or.*"]—See RAILWAY, 1.

"*Person Having the Charge or Control of an Engine or Machine upon a Railway.*"]—See MASTER AND SERVANT, 2.

"*Preferential Lien.*"]—See LANDLORD AND TENANT, 1.

"*Purposes.*"]—See ASSESSMENT AND TAXES, 2.

"*Unlawfully.*"]—See CRIMINAL LAW, 7.

WORKMEN'S COMPENSATION FOR INJURIES ACT.

See MASTER AND SERVANT, 2

WRIT OF SUMMONS.

1. *Defendants Resident out of Ontario—Carrying on Business in Ontario—Partnership—Service on Person in Ontario—Con. Rule 223—Leave to Appeal—Conflicting Decisions—"High Court"—Con. Rule 777 (3) (a) (b).*—The defendants R. carried on business in partnership as stockbrokers in New York, and the defendants W. as stock brokers in Toronto, D. being manager for the latter. The plaintiff served the writ of summons upon D. at the place of business of the defendants W. in Toronto, alleging that D. was a person having the control or management there of the partnership business of the defendants R. (Con. Rule 223), the contention being that the defendants R. in fact carried on business in partnership with the defendants W. at Toronto:—

Held, upon the evidence, that the business carried on in Toronto

at the time of the service of the writ was the ordinary business of brokers with correspondents (the defendants R.) in New York, who, for a certain consideration, transacted such business as they saw fit to accept for the Toronto clients of the defendants W.; and charged such rates therefor as had been agreed upon; and the fact that on sales in New York on "short account" the defendants W. were to be paid half of the amount which the defendants R. received, did not constitute a partnership or business carried on in Toronto; and therefore the service was set aside.

Order of the Master in Chambers affirmed.

Leave to appeal to a Divisional Court was refused, there being no conflicting decisions by Judges of the High Court within the meaning of Con. Rule 777 (3) (a), which does not refer to the High Court in England; and there being no good reason to doubt the correctness of the judgment, as required by clause (b). *Ryckman v. Randolph*, 1.

2. *Service out of Ontario—Order Permitting—Con. Rule 162—Conditional Appearance—Con. Rule 173—Discretion—Appeal—Jurisdiction of Court over Foreigners.*—The power, under Con. Rule 173, to allow a conditional appearance should be exercised only where it is doubtful whether the plaintiff can bring himself within Con. Rule 162, by reason of the facts being in issue. Where a case is shewn within that Rule, there is no reason why a conditional appearance should be entered.

A defendant served with the writ of summons out of the jurisdiction under an order permitting such service, and not moving to

set aside the service, was refused leave to enter a conditional appearance.

Orders of the Master in Chambers and FALCONBRIDGE, C.J.K.B., affirmed.

Per BOYD, C., that the orders were discretionary, and the discretion exercised should not be interfered with.

Semble, *per* MIDDLETON, J., that a case was shewn within the provisions of Con. Rule 162; and remarks upon the jurisdiction of Ontario Courts in actions against foreigners, and as to the discretion to be exercised in permitting service out of Ontario. *Standard Construction Co. v. Wallberg*, 646.

3. *Service out of Ontario—Order Permitting—Insufficient Material—Supplementing on Motion to Set aside—Con. Rule 162 (e), (h)—Place of Contract—Place where Payment to be Made—Conditional Appearance—Assets in Ontario—Garnishable Debt.*—Where the material upon which an order is made for leave to serve a writ of summons out of the jurisdiction is insufficient, and the defendant moves to set aside the order and the service made pursuant to it, and upon that motion the plaintiff files in answer material sufficient to support the order, it and the proceedings under it should be validated.

Great Australian Gold Mining Co. v. Martin (1877), 5 Ch.D. 1, followed.

The action was for the price of goods sold and delivered; the plaintiff had shipped the goods from a place in Ontario to the defendant in Quebec; and upon an application to set aside an order for service upon the defendant in Quebec and the service effected there, it was in doubt upon the affidavits whether the contract was made in Ontario or Quebec, and, if made in Quebec, whether payment was to be made in Ontario (Con. Rule 162 (e)):

Held, that the proper order was one allowing the defendant to enter a conditional appearance.

Canadian Radiator Co. v. Cuthbertson (1905), 9 O.L.R. 126, followed.

Held, also, that the defendant at the time the order was made had assets in Ontario of the value of \$200, within the meaning of Con. Rule 162 (h). A garnishable debt owing by a person in Ontario is "assets" in Ontario. A debt by contract can have no other local existence than the personal residence of the debtor.

Commissioner of Stamps v. Hope, [1891] A.C. 476, followed. *Kemmerer v. Watterson*, 451.

WRONGFUL DISMISSAL.

See MASTER AND SERVANT.

